No. 82-2137

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JBL ENTERPRISES, INC.,
JEAN ROBINSON, and
LOIS JEAN MILLION,

Petitioners,

v.

JHIRMACK ENTERPRISES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DATED: June 27, 1983

QUESTION PRESENTED

The Ninth Circuit's decision in this distributor termination case raises a fundamental antitrust issue concerning the standard for testing the legality of a vertical restraint on competition. The following issue should be addressed together with the issues to be considered in Monsanto Co. v. Spray-Rite Service Corp., No. 82-914:

> Is a manufacturer engaged in *per se* unlawful price-fixing, when it combines with others to enforce customer restrictions which limit the sale of its products to those customers who insist on the restrictions primarily to avoid retail price competition.

This issue presents an important question of law regarding what conduct continues to be vertical price-fixing since this Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

PARTIES TO THE PROCEEDINGS

Petitioners JBL Enterprises, Inc., Jean Robinson and Lois Jean Million were appellants below on the issue presented for review. Respondent Jhirmack Enterprises, Inc. was appellee below on the issue presented for review.

JBL Enterprises, Inc. has no parent company, subsidiary or affiliate. Jean Robinson and Lois Million are individuals.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit filed on February 8, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 698 F.2d 1011, 1982-83 Trade Cases ¶65,199, and appears in Appendix B to this petition. The two opinions of the District Court are reported at 519 F.Supp. 1084, 1981-2 Trade Cases ¶64,158, and 509 F.Supp. 357, 1981-1 Trade Cases ¶63,870, and appear in Appendix D and Appendix E, respectively.

JURISDICTION

The judgment of the Court of Appeals was filed on February 8, 1983. A timely petition for rehearing with suggestion for rehearing *en banc* was denied April 1, 1983. Appendix A. Jurisdiction of this Court is premised upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT OF THE CASE

This petition raises the question of what conduct is vertical price-fixing. Petitioners contend that a supplier's refusal to deal with one group of discounting retailers at the insistence of another competing group of retailers who desire to avoid price competition, constitutes vertical price-fixing. Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979). The Ninth Circuit Court of Appeals disagrees.

This petition also presents the important issue, not yet addressed by this Court, as to the proper standard to apply to a vertical restraint of trade which takes both the form of a price-fixing combination and a customer restriction. The facts of this case clearly involve an interplay between the *per se* standard consistently applied to vertical price-fixing since *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and the rule of reason standard applied to vertical customer restrictions since *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Indeed, this case demonstrates that Mr. Justice White had good reason to be concerned when he pointed out in his concurring opinion in *Sylvania* that a customer restriction "prevents discount stores from getting the manufacturer's

product and thus prevents intrabrand price competition." 433 U.S. at 60.

Petitioners are former distributors of Jhirmack Enterprises, Inc. ("Jhirmack"), a manufacturer of hair care and cosmetic products which are sold throughout the United States. Petitioners allege that they were victims of a price-fixing conspiracy when their distributorships were cancelled in 1977 and 1978 for failure to confine their sales to beauty salons, barber shops, beauty schools, barber schools and hair-styling establishments (the "professional salon trade" or "PST"). Instead, petitioners "diverted" Jhirmack products for eventual resale by other types of retail outlets that discounted the products, such as drug stores and supermarkets ("over-the-counter" or "OTC" outlets). Petitioners contend that Jhirmack violated

section 1 of the Sherman Act, 15 U.S.C. §1, by combining with its distributors and salons to prevent the diversion of Jhirmack products to discounting OTC outlets for the purpose and effect of stabilizing and maintaining retail prices.

<u>The District Court Decisions</u>

The complaint[1/] charges as alternative causes of action, an illegal price-fixing combination and an unreasonable customer restriction.[2/] Although both claims are based on the same facts,

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[1/] Petitioners brought this treble damage action under section 4 of the Clayton Act, 15 U.S.C. §15.

[2/] Petitioner's original resale price maintenance claim was dismissed with leave to amend the complaint to plead a cause of action of "a combination and conspiracy on the issue of resale price maintenance." Appendix F. The Court of Appeals correctly recites that resale price maintenance was al-

(footnote continued on next page)

the *Sylvania* decision requires that the customer restriction be tested for its impact upon a relevant market. Accordingly, petitioners stipulated to a court trial of issues regarding the relevant market and Jhirmack's share of the relevant market. Petitioners asserted that the salons so successfully prevailed upon Jhirmack and certain other suppliers of retail shampoos and

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(footnote continued from preceding page)

leged, 698 F.2d at 1014, App. B-4, yet erroneously states that no *per se* claim of price-fixing was made prior to the market trial. *Id.*, App. B-6. In their Memorandum Re Case Status, written at the district court's request when the case was reassigned, petitioners said:

> Plaintiffs believe that price motivation will warrant that a *per se* standard be applied to the conduct. However, in the event a rule of reason standard applies, additional issues involving relevant market and anticompetitive impact must be addressed.

CR 230, pp. 8-9 (See note 3, *infra*).

conditioners to prevent any competition from OTC outlets, that retail sales by salons at premium prices formed a distinct relevant submarket, of which Jhirmack's products comprised a significant share.

After a five-day trial the district court rendered its findings of fact and conclusions of law. 509 F.Supp. 357, Appendix E. The district court focused on the wholesale level of distribution and defined the relevant market as the sale of all beauty products to beauty salons and other professional outlets. Under this definition Jhirmack's market share was less than 5%. Upon Jhirmack's motion for summary judgment, the district court concluded that with such a small market share, Jhirmack could not have imposed an unreasonable restraint upon trade in the relevant market. 519 F.Supp. at 1088, App. D-9.

The relevant market trial, however, also produced findings of fact which strongly support petitioners' claim of price fixing. The district court found that beauty salons insulated themselves from price competition with drug stores and supermarkets by insisting that Jhirmack and other suppliers sell exclusively to them, and not allow the products to be diverted to OTC outlets. Other findings clearly show that Jhirmack's marketing scheme was designed to accommodate the salons' avoidance of intrabrand price competition.

The district court explained how the prevention of competition between beauty salons and OTC outlets succeeded in raising prices:

> The essence of the entire controversy is that beauty salons insist on carrying only shampoos, conditioners and other beauty products which are not generally available

> at OTC outlets. There is abundant evidence that beauty salons have discontinued buying certain brands--including Jhirmack--once the brands could be purchased at drug and discount stores and similar outlets. By their course of conduct, therefore, salon operators have generally prevented direct competition with OTC outlets in the sale of particular brands and have succeeded in maintaining a price range for shampoos and conditioners generally higher than that prevailing at OTC outlets.

509 F.Supp. at 371, App. E-40 - E-41.

The district court graphically described the salons' efforts to insulate themselves from competition with drug stores as a "contrived fencing-in of a segment of the market" and a "patently anti-competitive practice." 509 F.Supp. at 371, 376, App. E-41, E-63. The anti-competitive purpose and effect of such "fencing-in" was that salons charged consumers higher retail prices for Jhirmack products than would have been charged in a market free of restraint:

> The testimony establishes that salons could not maintain their price levels for products like Jhirmack if the same product were widely available to the consumer through OTC outlets, and that the salons' ability to charge a premium price for a certain brand depends on limited availability of that brand.
>
> * * *
>
> Plaintiffs have shown that the salon retail prices of brands manufactured exclusively for salons were substantially higher than prices of the same products sold in OTC outlets through diversion. It appears that when diversion of an exclusive brand like Jhirmack is slight, the limited availability of the product in OTC outlets at substantially lower prices does not impinge on salons' ability to maintain the regular premium price. When diversion of an exclusive brand becomes extensive enough to cut into a salon's sales of that brand, salons tend to discontinue that brand and find another. Thus widespread diversion of an exclusive salon brand provides a competitive check on the salon's ability to sell that brand at a premium price.

509 F.Supp. at 374, App. E-53 - E-54.

The district court further found that Jhirmack "catered" to the salons' desire

to avoid price competition.

> As heretofore noted, some manufacturers of shampoo and conditioners produce for distribution exclusively within the salon trade. They cater to a strong demand among salons for brands which are distributed exclusively to salons and project an elite professional image. Many salons decline to sell products available in OTC outlets, primarily in order to avoid price competition. Salons are generally unable to maintain premium prices for products widely available at lower prices in OTC outlets.

509 F.Supp. at 375, App. E-59.

Jhirmack published suggested wholesale and retail price lists for the distributors and salons. CR 404, Exhibit A, pp. 52-55, 57.[3/] The price structure that Jhirmack promoted gave the salons a 50% profit margin on the sale of re-

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[3/] The designations "CR" and "TR" refer, respectively, to the district court clerk's record and the transcript of the market trial, which were transmitted to the Ninth Circuit Court of Appeals.

tail products. TR 307. Jhirmack's marketing concept was that its products would not be discounted and that the suggested prices would be maintained as much as possible. CR 393, Exhibit D, pp. 79-80. When distributors raised wholesale prices to salons and thereby cut into the salons' margins, Jhirmack published the suggested wholesale prices in trade magazines to discourage any such deviations. CR 393, Exhibit G, Exhibit H, pp. 123-124.

There is absolutely no question that Jhirmack combined with salon owners and distributors to prevent the sale of Jhirmack products to OTC outlets that would not adhere to Jhirmack's retail prices. The district court expressly recognized that "Jhirmack received complaints from salon owners and distributors about instances of diversion to OTC

outlets, and took steps to identify the distributors involved and discourage this activity." 509 F.Supp. at 363, App. E-9 - E-10. Jhirmack assisted and cooperated with salon owners and distributors in policing the market by using batch code or lot numbers from the bottoms of Jhirmack containers to trace distributors, such as petitioners, who sold diverted products. CR 393, Exhibit B, pp. 136-137. Jhirmack's president admitted that she maintained a book with correspondence and lists regarding code numbers and information on diverted products for the purpose of recording instances of diversion. CR 393, Exhibit C, pp. 39-40. While all this policing activity was transpiring, Jhirmack's founder was constantly in personal contact with salon owners at beauty shows, seminars and clinics, re-

peatedly assuring them that Jhirmack products would never be sold in drug stores. CR 404, Exhibit B, pp. 40-41, TR 326-327.

In the face of all these established facts, the district court nevertheless dismissed the price-fixing claim because there was no evidence "that Jhirmack fixed the resale prices for its products or enforced compliance with a particular price schedule. 519 F.Supp. at 1088, App. D-10. Upon dismissal of Jhirmack's counterclaims, judgment was entered. Appendix C. Petitioners filed a timely appeal.

The Ninth Circuit Decision

The Ninth Circuit Court of Appeals affirmed the district court's judgment in all respects. 598 F.2d 1011, Appendix B. Concerning the price-fixing claim,

the Court of Appeals agreed with the district court that there was no evidence of enforced compliance with a particular price schedule. 698 F.2d at 1015, App. B-10.

Petitioners, however, argued in both the district court and the Court of Appeals, that setting prices at a particular level is not a *sine qua non* of a price-fixing claim. This case falls within the fact pattern and reasoning of *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). In *Cernuto*, the plaintiff complained it was terminated as a dealer in kitchen cabinets because a competing dealer complained to its supplier that plaintiff was discounting the cabinets. The Third Circuit held that such facts supported a *per se* claim of price-fixing because the supplier's action was moti-

vated by its customer's desire to eliminate price competition. 595 F.2d at 166-169.

The Ninth Circuit distinguished petitioners' case from Cernuto on the two grounds that (1) petitioners were not competitors of the salons who were concerned about price competition from OTC outlets, and (2) no distributors complained about price competition from petitioners. 698 F.2d at 1015, App. B-10 - B-11. Accordingly, the dismissal of this case on summary judgment was affirmed despite the substantial evidence in the record, recognized by both the district court and the Court of Appeals, that a combination existed for the purpose and effect of eliminating retail price competition between salons and OTC outlets, and that petitioners

were terminated as distributors when they were detected as a source of supply to discounting OTC outlets.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit rejected the per se price-fixing claim in this case because it concurred with the district court that there was "'no evidence . . . that Jhirmack fixed the resale prices for its products or enforced compliance with a particular price schedule.' 519 F.Supp at 1088." 698 F.2d at 1015, App. B-10. This narrow definition of price-fixing directly conflicts with the long standing principle established by this Court that price-fixing is more expansive than merely setting prices at exact levels or adhering to particular price schedules.[4/]

[4/] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980)(elimination

(footnote continued on next page)

This Court's vertical price-fixing decisions have condemned various forms of concerted action by a manufacturer and its wholesalers to control resale prices and prevent intrabrand price competition.[5/]

(footnote continued from preceding page) of "discount" via uniform credit is price-fixing); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944) (price-fixing is requirement to sell at "locally prevailing prices"); United States v. Socony-Vacuum Oil Co., 310 U.S. 150,223 (1940)(price-fixing is "raising, depressing, fixing, pegging, or stabilizing" prices). See also Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-169 (3d Cir. 1979) (setting "exact level" of price "is not a sine qua non of a per se violation . . . under the price-fixing rubric").

[5/] United States v. Park, Davis & Co., 362 U.S. 29, 45 (1960)(wholesalers required not to sell to retailer who deviated from suggested resale prices); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944)(agreements with wholesalers to resell only to licensed retailers who maintained locally prevailing prices); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922)(wholesalers permitted to deal only with retailers who maintained suggested retail prices); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)(written agreements allowing wholesalers to sell only to licensed retailers who entered into price maintenance agreements with the manufacturer).

Never has this Court suggested that their illegality turned on setting of prices at exact levels or adhering to particular price schedules. The critical point is that any vertical control of prices "destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions by agreement with each other.'" California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 103 (1980); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911).

The Third Circuit Court of Appeals in Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) has recognized that a vertical combination is price-fixing where its motivating factor is the suppression of price competition at the retail level, rather than the promotion of competition at the manufacturer level.

595 F.2d at 168. The combination is _per se_ unlawful although it does not set prices at an exact level because its purpose and effect is to restrain price movement. 595 F.2d at 168-169.

Cernuto is not inconsistent with this Court's _Sylvania_ decision.[6/] However, confusion remains in the lower courts as to what conduct is price-fixing, particularly where non-price restraints are part of the price-fixing scheme. The Third Circuit in _Cernuto_ concluded that _Sylvania's_ tolerance of reasonable restraints to improve the manufacturer's competitive position" may not be converted into a blanket allowance of _any_ marketing decision made by a manufacturer." 595 F.2d at 167-168 (original emphasis).

[6/] This Court expressly noted in _Sylvania_ that vertical price restrictions remain _per se_ illegal. 433 U.S. at 51 n.18.

The Ninth Circuit refused to apply the reasoning of Cernuto to the facts of this case, which are certainly sufficient to support petitioners' claim that a combination existed with the purpose and effect of suppressing retail price competition. While cautiously conceding that vertical restraints "may" be illegal where their purpose and effect are to limit horizontal competition, 698 F.2d at 1015, App. B-11 - B-12, the Ninth Circuit nevertheless distinguished petitioners' case from Cernuto on two grounds which signify that this Court of Appeals misunderstands the fundamental reason why the conduct in this case is price-fixing.

First, the Ninth Circuit points out that petitioners, as distributors, are not competitors of the salons who are retailers complaining about price compe-

tition from other retailers. 698 F.2d at 1015, App. B-10 - B-11. Second, the Ninth Circuit concludes that because no other distributors complained about price competition from petitioners, id., App. B-11, there is no elimination of horizontal price competition. Id., App. B-12 - B-13. The Ninth Circuit therefore fails to recognize that this case concerns a retail price-fixing combination, which petitioners as wholesalers can challenge because their removal as a source of supply to discounting retailers was a means of accomplishing the anticompetitive result.[7/]

This failure is puzzling because the

[7/] This Court has already held that a Clayton Act §4 remedy is not "restricted to those competitors whom the conspirators hoped to eliminate from the market," but is available to those whose injury is "a necessary step in effecting the ends of the illegal conspiracy." Blue Shield of Virginia v. McCready, ___ U.S. ___, 102 S.Ct. 2540, 2549 (1982).

Ninth Circuit's opinion does observe that salons were concerned with maintaining retail prices and complained about price competition from OTC outlets. 698 F.2d at 1013, 1015, App. B-3, B-10 - B-11.

This case does not turn on the unsupported distinctions which the Ninth Circuit makes regarding levels of distribution, but rather on the reason why Jhirmack combined to enforce customer restrictions. The Ninth Circuit fails to grasp this fundamental point, and its decision further confuses the law of vertical price-fixing.[8/] This is cer-

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[8/] This confusion is apparent from a citation to this case by the Government in its amicus curiae brief filed in support of the petition for a writ of certiorari in Monsanto Co. v. Spray-Rite Service Corp., No. 82-914. This case is cited for the proposition that "the fact that a distribution restriction indirectly exerts some pressure on dealers' prices is not enough to transform a nonprice arrangement into resale price maintenance." Brief for the United States As Amicus Curiae in Support of Petitioner, 18 n. 25.

tainly a case in which "motive and intent play leading roles"[9] in determining whether the vertical restraint is price-fixing, and the Ninth Circuit and other lower courts faced with vertical restraint cases should not be allowed to continue to lose sight of that principle. Given Jhirmack's intention that its products not be discounted, and its combination with distributors and salons to exclude discount outlets from selling its products because of the salons' insistence upon avoiding price competition -- an insistence which the district court labeled "patently anticompetitive" -- summary judgment should not have been granted nor affirmed. The summary dismissal in this case is the result of the lower courts'

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[9] Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)

inability to analyze properly what conduct continues to be price-fixing since Sylvania.

The analysis must begin with a continued recognition that a combination which tampers with price structures is an unlawful activity, and this is so even though the members of the price-fixing group are in no position to control the market.[10/] Accordingly, combinations formed for the purpose of suppresssing price competition in the sale of only one brand are illegal.

In Dr. Miles Medical Co. v. John D. Park & Sons Co.,[11/] and recently in California Retail Liquor Dealers Association v. Midcal Aluminum Inc.,[12/] this Court con-

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10/ United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940)

11/ 220 U.S. 373, 407-408 (1911).

12/ 445 U.S. 97, 103 (1980).

cluded that resale price maintenance is equivalent to horizontal price-fixing among dealers or retailers. The _per se_ illegality rests on the reasoning that a manufacturer itself has no economic interest in establishing resale prices, therefore no purpose is served other than the anticompetitive one of raising resale prices. The Government, in its amicus curiae brief filed in _Monsanto_, [13/] challenges the reasoning that resale price maintenance would likely be used by a manufacturer merely as a way to raise resale prices because "a price-fixing combination at the retail level would tend to reduce quantities sold and thereby damage a manufacturer's objectives."[14/]

[13/] _Monsanto Co. v. Spray-Rite Service Corp._, No. 82-914.

[14/] Brief for the United States As Amicus Curiae in Support of Petitioner, 21, 24-25.

This case, however, presents an example of why a manufacturer would have an anti-competitive purpose in maintaining resale prices. When Jhirmack products began to appear at discount prices in OTC outlets, salons could not maintain their premium prices, and more importantly, the profit margin that Jhirmack's price structure offered them. As the district court found, salons reacted to such competitive pressure by discontinuing the purchase of brands -- including Jhirmack -- which could be purchased at discount stores. 509 F.Supp at 371, App. E-40 - E.41.

Jhirmack could react in several ways to the competitive pressure faced by the salons. It could, of course, maintain its prices and its distributors' suggested wholesale prices, and hope that discount retail prices would eventually result in increased OTC sales, and greater revenues.

Second, it could reduce its prices and its distributors' suggested wholesale prices as a way to preserve retail margins and compete for the continued patronage of its salon customers. This method would subject Jhirmack and its distributors to a squeeze on their profits, and would leave them vulnerable to future reductions in margin because of further retail discounting by OTC outlets. Finally, Jhirmack could avoid the pressures of retail discounting on its profits by preventing that discounting. Jhirmack elected to pursue that last course of action, which resulted in the maintenance of premium prices to consumers and a profit structure dependent upon those premium prices.

The essence of competition among manufacturers selling to salons, therefore, was the maintenance of retail pro-

fit margins for the salons. The question which the Court of Appeals and the district court failed to address in this case is why Jhirmack acted to maintain profit margins. Petitioners contend that this inquiry determines the legality of Jhirmack's conduct.

There is certainly an issue of fact in this case as to whether Jhirmack can reasonably argue that salon profit margins must be preserved in order to insure point-of-sale service. The district court found that "consumers do value a hairdresser's advice," but "the evidence is not convincing that they need such advice," 509 F.Supp. at 375, App. E-58 - E-59. The facts in this case instead suggest that the maintenance of prices and profit margins was caused by the salons' attempts to avoid competition with more efficient retailers. The

vertical restrictions in this case merely frustrate distribution efficiency rather than achieving it as contemplated by this Court in Sylvania.[15/]

This Court should not reject the rule of *per se* illegality applied to vertical price-fixing. Where ample evidence exists, as in this case, of a combination instituted to eliminate retail price competition, then there is a sufficient basis for a *per se* price-fixing

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[15/] Vertical restraints are often caused by less efficient dealers and impair the advancement of real distribution efficiencies. Steiner, *Vertical Restraints and Economic Efficiency*, Working Paper No. 66, Bureau of Economics, Federal Trade Commission (June 1982). The antitrust laws must be concerned with more than interbrand competition among manufacturers. The preservation of intrabrand competition among different types of retailers may result in increased distribution efficiency as manufacturers shift to retailers with lower costs and profit margins. Consumers therefore benefit from intrabrand competition as well as from interbrand competition.

claim to be presented to the trier of fact for a determination of what the motive was for the combination. The trier of fact should decide whether the purpose of the combination was to eliminate intrabrand price competition, or promote interbrand competition. If the purpose of the combination was to eliminate intrabrand price competition, there is a violation of the Sherman Act. If the purpose of the combination was to promote interbrand competition through reasonably beneficial non-price benefits, there is no violation of the Sherman Act in the absence of further proof that the combination unreasonably restrained trade in the relevant market.

Under this approach, the conflict concerning application of the _per se_ or the rule of reason standard in vertical restraint cases, can be reconciled.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

DATED: June 27, 1983

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 82-4102

JBL ENTERPRISES, INC., dba JHIRMACK OF UTAH; JEAN ROBINSON; dba JHIRMACK OF IDAHO and JHIRMACK OF BOISE; LOIS JEAN MILLION, dba JHIRMACK OF NORTH CENTRAL INDIANA,

Plaintiffs-Appellants,

v.

JHIRMACK ENTERPRISES, Inc.,

Defendant-Appellee.

Case No. 82-4107

AL BOOTH and THELMA R. BEAN, individually; JHIRMACK OF WASHINGTON, D.C., INC.; WALTER R. CECCHINI, JR., individually; and JHIRMACK OF SOUTHWESTERN PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

JHIRMACK ENTERPRISES, INC.; IRENE REDDING, ALBERT L. SCHWARTZ and GARY McCORD, individually; INTERNATIONAL PLAYTEX, INC.,; JOEL E. SMILOW, individually, and ESMARK, INC.,

Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Filed April 1, 1983

ORDER

Before: MERRILL, DUNIWAY and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-4102

JBL ENTERPRISES, INC. dba JHIRMACK OF UTAH; JEAN ROBINSON, dba JHIRMACK OF IDAHO and JHIRMACK OF BOISE; LOIS JEAN MILLION dba JHIRMACK OF NORTH CENTRAL INDIANA,

Plaintiffs/Appellants,

v.

JHIRMACK ENTERPRISES, INC.,

Defendant/Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, William W. Schwarzer, District Judge, Presiding.

Filed and entered February 8, 1983

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 82-4102

JBL ENTERPRISES, INC., dba JHIRMACK OF UTAH; JEAN ROBINSON, dba JHIRMACK OF IDAHO and JHIRMACK OF BOISE; LOIS JEAN MILLION, dba JHIRMACK OF NORTH CENTRAL INDIANA,

Plaintiffs-Appellants,

v.

JHIRMACK ENTERPRISES, INC.,

Defendant-Appellee.

Case No. 82-4107

AL BOOTH and THELMA R. BEAN, individually;
JHIRMACK OF WASHINGTON, D.C., INC.;
WALTER R. CECCHINI, JR., individually; and
JHIRMACK OF SOUTHWESTERN PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

JHIRMACK ENTERPRISES, INC., IRENE REDDING,
ALBERT L. SCHWARTZ, and GARY McCORD,
individually; INTERNATIONAL PLAYTEX, INC.;
JOEL E. SMILOW, individually; and ESMARK,
INC.,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge,
Presiding.

Argued and Submitted December 17, 1982

Decided February 8, 1983

OPINION

Before: MERRILL, DUNIWAY and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

These appeals arose out of a common scenario. The plaintiffs in both actions are former distributors of defendant Jhirmack Enterprises, Inc. ("Jhirmack"). When their contractual relationships broke down, the disappointed parties sought solace (and treble damages) from the court, alleging various antitrust violations and related contract and tort claims. Following summary judgment in favor of the defendants, the plaintiffs appeal. We affirm.

FACTS:

Jhirmack manufactures hair care and cosmetic products which are distributed throughout the United States by licensed distributors. The company was founded in 1968 by Jheri and Irene Redding. From

1972 to 1979 Jhirmack followed a marketing strategy of making its products available through beauty salons, barber shops, beauty schools, barber schools and hair styling establishments (the "professional salon trade" or "PST") rather than through other types of outlets, such as drugstores, department stores and the like ("over-the-counter" or "OTC" outlets). Such a limited outlet strategy is often adopted by new firms who wish to avoid the large advertising costs necessary to break into the heavily competitive OTC market in hair care and beauty products. To this end Jhirmack contracted with several independent distributors, including the three JBL plaintiffs and the Booth plaintiffs, giving each an exclusive geographic territory and requiring each to "exclusively devote its entire time and use its best efforts to promote and sell" Jhirmack's products to PST outlets in their respective terri-

tories. The contracts also provide that Jhirmack "will not appoint another distributor within the territory," and set minimum purchase quotas for each distributor, based on Jhirmack's estimate of potential PST accounts within the assigned territory.

In 1976-77, Jhirmack received complaints from salon owners and distributors that its products were appearing in OTC outlets. Salons charge premium prices for products sold to their customers and prefer the prestige that flows from carrying products not generally available. It is difficult for PST outlets to maintain either prices or prestige if the product can be found in the local supermarket at a substantially lower price. Many PST outlets will therefore refuse to carry products that are generally available OTC. On receiving complaints Jhirmack took steps to determine which distributors were "diverting" its products

to OTC outlets and to discourage them from doing so.

In 1978, Jhirmack terminated the JBL distributors for refusing to follow Jhirmack's marketing plan and for failing to meet its order quotas for their respective territories. JBL filed suit, alleging that the terminations were the result of illegal territorial and customer restrictions, resale price maintenance and illegal tying arrangements in violation of federal antitrust law, and fraud or negligent misrepresentation in setting minimum purchase quotas.

By 1979, Jhirmack had developed sufficient name recognition to move into the OTC market. After negotiations with several companies, it entered an agreement with International Playtex, Inc. ("Playtex") in October 1979. In exchange for the exclusive right to distribute Jhirmack shampoos and conditioners to OTC

outlets, Playtex agreed to conduct a nationwide marketing campaign, pledging to spend seven million dollars the first year and fifteen percent of annual net sales in succeeding years promoting the products. The contract specifically excluded the professional salon trade, and Jhirmack continued to use independent distributors for its PST distribution.

In November 1979, Jhirmack sent new distributor agreements to its PST distributors, requiring them to recognize Playtex as the exclusive OTC distributor of Jhirmack shampoos and conditioners. Booth refused to sign the new agreement and so was terminated by Jhirmack in December 1979. Booth then filed suit alleging that the contract between Jhirmack and Playtex violated the Sherman and Clayton Acts and breached its own contract with Jhirmack.

The _JBL_ and _Booth_ actions were consolidated for a limited trial on the relevant market and tying issues. _JBL Enterprises v. Jhirmack Enterprices [sic], Inc._, 509 F. Supp. 357 (N.D. Cal. 1981). The definition of the relevant market was crucial to a determination of whether Jhirmack possessed sufficient market power that its vertical nonprice restrictions could amount to an unreasonable restraint of trade. At the time no claims of _per se_ antitrust violation had been made except for the tying claim. The district court concluded that the relevant market was the market for the sale of beauty products (including but not limited to shampoos and conditioners) to PST outlets. Under this definition, Jhirmack's market share in 1976-78 was found to be 2.3%, 3.2% and 4.2%, respectively.

Jhirmack then moved for summary judgment against the JBL plaintiffs on the

ground that in light of Jhirmack's insignificant market share the alleged restraints could not as a matter of law have had the requisite adverse effect on competition. JBL sought to avoid dismissal on two theories: (1) that Jhirmack's small market share did not establish lack of market power because it faced no interbrand competition; and (2) that Jhirmack engaged in price-fixing, a *per se* violation. The court rejected both theories. On the fraud claim the court found that JBL had presented no facts on two essential elements. Summary judgment was therefore entered on all counts. *JBL Enterprises v. Jhirmack Enterprises, Inc.*, 519 F. Supp. 1084 (N.D. Cal. 1981).

In the Booth action, in opposition to defendants' motion for summary judgment, the plaintiffs raised a *per se* claim of price-fixing, alleging that Jhirmack and Playtex conspired to fore-

close price competition between Playtex and Booth in the OTC market in violation of Sherman Act § 1. The court granted summary judgment for the defendants on this issue, as well as on a claim against Playtex for inducing breach of contract, and a claim that Booth's termination breached an implied covenant of good faith and fair dealing. Summary judgment was denied on the claim that Playtex's appointment breached the exclusive territory clause of the Booth-Jhirmack contracts, but this claim was later dismissed and that dismissal has not been appealed.

Both sets of plaintiffs appeal the respective grants of summary judgment; the JBL plaintiffs also attack the district court's determination of the relevant market.

ANALYSIS:

I. The JBL Action

A. Per Se Price-Fixing

In Continental TV., Inc. v. GTE

Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court, while it did "not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition," id. at 58, held that in general such nonprice restrictions imposed by a manufacturer on distributors or retailers must be tested under the Rule of Reason. The Court found that, while vertical restrictions reduced intrabrand competition, they had redeeming virtues in that they tended to promote interbrand competition. Dealers would be more likely to expend the effort necessary to promote or service a product if they did not have to worry about other dealers of the same product taking a "free ride" on their efforts. Thus the manufacturer who imposed customer or territorial restrictions would be better able to enter the market as a new competitor or maintain its presence as an existing competitor with other manufacturers.

JBL attempts to place itself outside the reach of GTE Sylvania by allegations of a conspiracy among Jhirmack, other distributors, and salons to eliminate JBL as a competitor so as to reduce price competition. Its attempt fails.

First, the district court found "no evidence ... that Jhirmack fixed the resale prices for its products or enforced compliance with a particular price schedule." 519 F. Supp. at 1088. Nor was there any indication that suggested prices were in fact adhered to. Thus JBL cannot rely on United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), where nonprice restraints were imposed to facilitate a vertical price-fixing scheme.

Second, JBL was not a competitor of the complaining salons. Rather, the salons were customers of distributors like JBL. Although the salons may have been concerned with maintaining the prices they

charged consumers, the price competition they faced was not from JBL but from other retailers, especially OTC outlets that carried competing brands.

Third, the other distributors, who would have been in competition with JBL but for the territorial restrictions, were not concerned with eliminating price competition from JBL. There is no indication that the complaining distributors wished (or thought they were permitted) to make sales to the OTC outlets at all, much less at a higher price than that charged by JBL. Rather, the clear indication is that the complaining distributors were concerned that their customers (the salons) would stop carrying Jhirmack products if the diversion continued.

Per se condemnation of apparently vertical restraints may be appropriate where the purpose and effect of those restraints is to limit horizontal compe-

tition. In Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979), plaintiff claimed it had been terminated as a dealer in United's line of kitchen cabinets because a competing dealer complained to the manufacturer that the plaintiff was discounting the cabinets. The Third Circuit found that "a manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitor at the request of the competitor," 595 F.2d at 166, would constitute a per se violation. It based its decision on the pernicious effect of the practice--elimination of possible price competition from the foreclosed dealer--and the lack of any redeeming virtue. The court noted that generally manufacturers are free to impose vertical territorial restrictions, but that two factors made United's alleged action unlawful. First, the action was taken at the

behest of a competitor on the same level as the plaintiff; thus the restraint was horizontal rather than vertical in purpose and effect. Second, the complaining dealer was allegedly seeking to eliminate price competition. 595 F.2d at 168.

In order to make out a claim under the reasoning of Cernuto, JBL would have to allege that a competitor of JBL prevailed on Jhirmack to terminate JBL in order to eliminate either actual or potential price competition from JBL. No such allegation was made, and the district court correctly granted summary judgment on the price-fixing claim.

B. Market and Market Share

All parties agreed to a separate trial to determine (a) the relevant product and geographic market, (b) Jhirmack's share of that market, and (c) whether Jhirmack imposed *per se* unlawful tying arrangements. Only the market findings are appealed. These are findings of fact

and thus subject to a clearly erroneous standard of review. Twin City Sportservice v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982). Although market definitions are inherently imprecise, the district court's determination is supported by the available evidence and must be upheld.

As this circuit stated in Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979), analysis of whether a particular action restrains competition involves a consideration of its impact "within the field of commerce in which the plaintiff was engaged and upon those commercially engaged in competition within it." In determining what the field of competition is, "courts are not free to accept whatever market is suggested by the plaintiff," id. at 389, but must examine the commercial realities within the industry in question.

Defining the market in a case such as this one is actually a two-step process. First the field in which the plaintiff was engaged must be defined in geographic and distributional terms. Then the product (or product line) that competes in that field must be determined. Since the parties stipulated as to the geographic market, the two determinations may be referred to as defining, respectively, the "distributional market" and the "product market."

The district court defined the relevant market as "the sale of beauty products, including but not limited to shampoos and conditioners, to beauty salons and other professional outlets." 509 F. Supp. at 369. Under this definition, Jhirmack's market share was less than 5%. JBL disputes both the product and the distributional market determinations, and argues that the market should be defined

as the sale of shampoos and conditioners _alone_ either _to_ professional outlets or, alternatively, _by_ professional outlets. Although, as stated above, the district court found that the relevant market existed at the wholesale level (sales _to_ salons), it carefully considered claims that a distinct submarket existed in the sale of shampoos and conditioners at the retail level (sales _by_ salons). The court concluded, however, that _if_ the relevant distributional market were to be found at the retail level, PST outlets faced competition from OTC outlets selling similar products, and so the relevant market would be the sale of shampoos and conditioners by all retail outlets. Under this market definition, Jhirmack's market share would have been less than 1% of shampoos and approximately 2% of conditioners.

We find it unnecessary to addres these alternative findings, however, because the district court correctly defined the relevant distributional market. JBL is engaged in the distribution of Jhirmack products to specific retailers, i.e., it operates as a wholesaler. It competes for PST customers with other wholesalers--some of whom also carry a single (competing) line, others of whom carry the products of many manufacturers.

The court's product market determination must also be upheld. The standard test of the product market is that it comprises those "commodities reasonably interchangeable by consumers for the same purpose." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956). However, this principle must be applied with reference to the specific market involved. So long as the distributional market is set at the wholesale level, the

fact that face creams and shampoos do not have the same use for the consumer is not as relevant as whether a "cluster" or "product line" of one manufacturer is reasonably interchangeable for that of another by the salon that is making the purchase.

This cluster approach is appropriate where the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately. Thus the full service features of commercial banks led the Supreme Court to find a cluster of products and services as the relevant product market in _United States v. Philadelphia National Bank_, 374 U.S. 321, 356 (1963), and _United States v. Phillipsburg National Bank & Trust Co._, 399 U.S. 350, 360 (1970). The rationale was that consumers do not generally shop for individual banking

services, especially because it is usually easier to obtain some services, e.g., loans, at the same bank where other services, e.g., savings accounts, are held. The approach was extended in A.G. Spalding & Bros., Inc., v. FTC, 301 F.2d 585, 604 (3d Cir. 1962), where the court found the relevant market to be "higher priced" athletic goods because each of the major manufacturers promoted and distributed such goods as a line.

In this case, eighty percent of Jhirmack's sales were of shampoos and conditioners. It did, however, manufacture a full line of beauty products and required each distributor to purchase a small amount of each product for potential sale to PST outlets. The industry generally considers it necessary to carry a full line, and advertising and promotion often group the products. Although salons do purchase individual products, this generally oc-

curs when the particular product is not available in the main product line chosen by the salon. The court thus reasonably concluded that Jhirmack faced competition (at the wholesale level) for PST sales from other product lines, and not only from other shampoos and conditioners.

C. Market Power

The trial court found that Jhirmack's market share was 2.3%-4.2% of beauty products sold to PST outlets (or 1%-2% of shampoos and conditioners sold by all retail outlets). These shares are too small for any restraint on intrabrand competition to have a substantially adverse effect on interbrand competition. See, e.g., Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1379 (9th Cir. 1981) (1.87% or 5.2%); Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 627 (9th Cir. 1977) (2% or

3%). JBL's contentions that Jhirmack possessed sufficient market power to significantly affect interbrand competition despite its insignificant market share are unsupported and were properly rejected at trial.

D. Fraud or Negligent Misrepresentation

JBL's contract with Jhirmack required JBL to purchase a minimum quantity of products each month. The contract states that JBL "acknowledges that the minimum purchase requirements provided herein are fair, just and reasonable." JBL claims that this statement is a fraudulent representation because the quotas were in effect a statement of the minimum revenues JBL could expect from the distributorship.

The district court found it "doubtful that quotas incorporated into a distributor[']s agreement afford a basis for a later fraud claim based on the distributor's failure to attain them." 519 F.Supp.

at 1089. Such a theory would, in effect, make the manufacturer an insurer of the distributor's business. The court found it unnecessary to reach this issue, however, because it concluded that JBL had failed to factually support two elements: (1) that the representations were made negligently or with intent to defraud; and (2) that JBL relied on the representations. We find no error in this conclusion.

II. The Booth Action

Booth contends that Jhirmack's promise to it of an exclusive distributorship meant that if Jhirmack moved into the OTC market within Booth's territory, it would have to do so through Booth. Since the contract also specified that Booth agreed to exclusively devote its full time to the PST outlets, Jhirmack and Playtex contend that the OTC market was excluded from the contract. The district

court denied summary judgment on this issue, and Booth has not appealed the later dismissal of the claim. In any event, this contract claim is irrelevant to whether Jhirmack conspired with Playtex to foreclose competition, violated a covenant of good faith and fair dealing, or was induced by Playtex to breach.

A. The Antitrust Claims

Booth claims that Jhirmack and Playtex conspired to foreclose competition in the OTC market for Jhirmack products in order to allow Playtex to fix prices in that market. It alleges, first, that the agreement between Jhirmack and Playtex, by giving Playtex an exclusive OTC license, violated Sherman Act § 1; and second, that its termination for refusing to accede to that agreement likewise violates the Act.

Booth does not dispute that Jhirmack could, without violating the antitrust laws, decide to appoint only

one OTC distributor and refuse to appoint any others, even if the net result of this course of action was to shield the sole distributor from potential price competition. See GTE Sylvania, 433 U.S. at 54-55; Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d at 1388. Booth's position, however, is that there already was competition, or at least potential competition, in the OTC market (i.e., Booth), and that the agreement was designed to eliminate that competition. It is difficult to square the contention that the Jhirmack-Playtex agreement would decrease intrabrand competition without increasing interbrand competition with Booth's position that if Jhirmack wanted to enter the OTC market it would have to do so through Booth, who had an exclusive territorial license. Had Jhirmack taken the route suggested by Booth, it would be Booth, and not Playtex, who would be

insulated from price competition from any other OTC distributor in its territory. And Booth would not face any intrabrand competition between PST and OTC outlets, since it would control distribution to both.

Although there are indications that Jhirmack did not always interpret its contract with Booth as prohibiting sales to OTC outlets, it is clear that, as the district court noted, "Jhirmack's products had not theretofore been officially distributed to OTC outlets, having been generally limited to professional outlets except for sporadic diversion." 519 F. Supp. at 1091. It is also clear that Jhirmack considered a substantial promotional campaign as a prerequisite to its ability to compete successfully with other shampoos and conditioners available in OTC outlets. Playtex's promise to spend seven million dollars

on promotion during the first year of its distributorship and substantial amounts thereafter fulfilled that prerequisite. While there is no allegation that Jhirmack would <u>never</u> have entered the OTC market had it not been able to find a distributor able and willing to engage in substantial promotional activity, the admittedly heavy interbrand competition existing in the OTC market for shampoos and conditioners makes it extremely unlikely that it would have entered at the time it did or that it would have been able to add effectively to that interbrand competition if it had chosen to do so without such a campaign. Jhirmack considered such an arrangement necessary and the realities of the market make that assumption quite reasonable.

The district court was therefore justified in concluding that "[t]he primary effect of the Jhirmack-Playtex agreement on competition in OTC channels

was to add the competitive activity of a major distributor and to increase the amount of Jhirmack products available to consumers in OTC outlets.... Moreover, the agreement also provided a new source of intrabrand competition for Jhirmack products sold in salons." 519 F. Supp. at 1091.

Since the initial agreement between Playtex and Jhirmack did not violate antitrust law, Playtex could certainly ask Jhirmack for aid in enforcing it without incurring antitrust liability. Booth, like JBL, seeks to invoke Cernuto, but again the situation is not analogous. In Cernuto, the manufacturer had not granted an exclusive license to any of its dealers. Rather it was providing kitchen cabinets to both dealers Famous and Cernuto. Famous, however, wanted to eliminate competition, and used its influence over the manufacturer

to secure Cernuto's termination as a dealer, thereby creating a net loss of intrabrand competition without any net increase in interbrand competition. Under <u>Cernuto</u>'s circumstances, <u>per se</u> condemnation may be appropriate; under the circumstances presented here, it is clearly inappropriate.

B. Good Faith and Fair Dealing

Booth claims that Jhirmack breached an implied covenant of good faith and fair dealing by terminating Booth for refusing to recognize Jhirmack's "illegal" contract with Playtex. Since that contract does not violate the antitrust laws, the district court properly rejected this claim.

C. Tortious Interference

The heart of Booth's tortious interference claim parallels its antitrust claims. Booth argues that its contract with Jhirmack conferred on it the right to sell OTC, that Playtex knew

Booth had that right, and that Playtex induced Jhirmack to to take that right away from Booth and give it to Playtex.

Whether Booth's contract did in fact confer OTC rights on Booth so that Jhirmack could have breached that contract in giving those rights to Playtex is not at issue here. What matters is whether Playtex knew that Booth had OTC rights in its territory. The elements of a claim of tortious interference are (1) a valid contract, (2) knowledge of the contract and intent to induce its breach; (3) breach; (4) causation, and (5) damages. Richardson v. La Rancherita, 98 Cal.App.3d 73, 80, 159 Cal.Rptr. 285 (1979). In this case it is clear that Playtex had no reason to believe that Booth and other PST distributors had any OTC rights and therefore could not have intended that they be breached. Playtex was worried that distributors who diverted

products to the OTC market had not bound themselves to incur heavy promotion costs, and would be able to "free ride" on Playtex's efforts, and undersell it. But there is no indication that it considered that diversion to be contractually sanctioned.

The district court's judgments are AFFIRMED in all respects.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-78-1227 WWS

JBL ENTERPRISES, INC., et al.,

Plaintiffs,

v.

JHIRMACK ENTERPRISES, INC.,

Defendant.

JUDGMENT

Filed January 15, 1982.

JUDGMENT

This action having come on for hearings before this Court, and the Court having dismissed all claims and counter-claims, no disputed issues of material fact appearing,

IT IS ORDERED AND ADJUDGED

1. That plaintiffs JBL Enterprises, Inc., Jean Robinson, and Lois Jean Million, take nothing;

2. That counterclaimant Jhirmack Enterprises, Inc., take nothing;

3. That the action, including all counterclaims, be dismissed on the merits; and

4. That each party bear its own costs of the action.

DATED: January 15, 1982

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-78-1227 WWS

JBL ENTERPRISES, INC., et al.,

Plaintiffs,

v.

JHIRMACK ENTERPRISES, INC.,

Defendant.

CONSOLIDATED FOR LIMITED TRIAL WITH

Case No. C-80-0249 WWS

AL BOOTH, et al.,

Plaintiffs,

v.

JHIRMACK ENTERPRISES, INC., et al.,

Defendants.

MEMORANDUM OF OPINION

AND ORDER

William W. Schwarzer,
District Judge,

Presiding.

Filed July 9, 1981

MEMORANDUM OF OPINION

AND ORDER

These cases are before the Court on defendants' motions for summary judgment.

Pursuant to Pretrial Order No. 1, the Court has heretofore held a separate trial on the issues of the relevant market and the market share of defendant Jhirmack Enterprises, Inc. ("Jhirmack"). The Court determined that for the purposes of these actions the relevant market comprises the sale of beauty products, including but not limited to shampoos and conditioners, to beauty salons and other professional outlets, which is the market in which plaintiffs competed. Defendant Jhirmack's share of that market ranged from 2.3% in 1976 to 4.2% in 1978. Its share of total manufacturers' shipments of beauty products for sale at retail was 0.3%. Plaintiffs contended,

however, that the relevant market comprises the sale of shampoos and conditioners to consumers for home use. If that market were accepted, the court determined, it would include all retail sales, including drug and discount stores and other over-the-counter ("OTC") outlets, in addition to beauty salons and professional outlets. In that market, Jhirmack's share of shampoo sales was less than one percent and its share of conditioner sales about two percent. JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 509 F. Supp. 357, 366-69, 376 (N.D. Cal. 1981).

The Court also determined that Jhirmack's requirement that each distributor order a specified quantity of a new product in his next regular order following the product's introduction constituted a tying arrangement but, because of Jhirmack's lack of

market power, did not amount to a per se violation. Accordingly, the lawfulness of that arrangement must be tested, just as the customer and territorial restraints complained of here, under the rule of reason. (509 F. Supp. at 376-79)

Following the issuance of the Court's ruling, all defendants moved for summary judgment on all claims. Because the responses of plaintiffs in the JBL action and of plaintiffs in the Booth action raise different issues, the actions will be separately treated.

I. The JBL Action

This action was filed in 1978 by a group of Jhirmack distributors in Utah, Idaho and Indiana. The amended complaint charged that beginning in 1974 Jhirmack (1) coerced plaintiffs into accepting unreasonable territory and customer restrictions precluding plaintiffs from discounting Jhirmack products by divert-

ing them outside of the assigned channels of trade, i.e., distributing them to others than beauty salons and other professional outlets, and (2) fixed prices by eliminating discounting of its products thereby inhibiting its distributors from competing. In addition plaintiffs charged a tying violation: that as a condition of purchasing Jhrimack's products and using its tradenames and trademarks, plaintiffs were required to make one-time purchases of certain undesired products. (509 F. Supp. at 376) These plaintiffs also alleged that Jhirmack made fraudulent representations regarding the setting of quotas for the sale by distributors of Jhirmack's products.

A. <u>The Antitrust Claims</u>

Defendants have moved to dismiss the antitrust claims principally on the ground that in view of Jhirmack's insignificant

market share the evidence as a matter of law establishes that the alleged restraints could not have had the requisite adverse effect on competition in the relevant market. See Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979); DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340 (9th Cir.) cert. denied, ____U.S.____, 101 S.Ct. 206 (1980).

The JBL plaintiffs make two arguments in response:

(1) That the restrictions imposed by Jhirmack had a substantial effect on competition;

(2) That Jhirmack combined with certain distributors in enforcing territory and customer restrictions to eliminate discounting, thus forming a resale price fixing scheme which was a per se violation of the antitrust laws.

1. Effect on Competition

The JBL plaintiffs contend, in substance, that although Jhirmack enjoyed less than 2% of the retail market for shampoos and conditioners, it possessed sufficient market power for its restrictions to have a substantial impact on competition because it faced no interbrand price competition in the sale of shampoos and conditioners to professional outlets. As they put it:

> Despite such small market share, Jhirmack possessed the market power to raise retail prices above the competitive price prevailing. (Memorandum, p. 19)

The "competitive level" of prices against which plaintiffs measure Jhirmack's prices are the prices of similar products in OTC outlets. The argument is that Jhirmack shampoos and conditioners were sold at higher prices than other brands, even other salon brands, and that it was only when Jhirmack

shampoos and conditioners were available at lower prices at drugstores and supermarkets, through diversion, that the salons' ability to sell Jhirmack products at a premium price was affected. Plaintiffs conclude that the only price competition faced by Jhirmack products at retail was intrabrand competition.

In support of these conclusions plaintiffs refer in kaleidoscopic fashion to facts showing the following:

(1) The prices of shampoos and conditioners sold in salons have been higher as a group than the prices of those sold in OTC outlets, both at wholesale and at retail.

(2) In the period extending through 1979, Jhirmack products were sold in salons at prices substantially higher than the prices at which diverted Jhirmack products were sold in OTC outlets.

(3) Through 1979, Jhirmack tended to set its suggested salon retail prices

somewhat higher than those of two of its competitors, Redken and KMS.

Plaintiffs' argument is fallacious. That salon brands may sell at higher prices than OTC products and that Jhirmack products sold in salons may, due to a strong consumer preference, command higher prices than certain other shampoos and conditioners and Jhirmack products sold at OTC outlets does not prove the absence of interbrand price competition, let alone that Jhirmack has any power to raise prices in the market for shampoo and conditioner.

The prices at which a product sells is a function of supply and demand. That a product is sold at a higher price than other functionally interchangeable products is a reflection of the value that the market attaches to that product when sold in a particular volume - it is not probative of the absence of price competition or of power to control price in the market. Every manufacturer of course

possesses power over the price at which he sells his products but that is not the power with which the antitrust laws are concerned.

Based on the evidence at the earlier trial, the Court previously found that shampoos and conditioners were functionally interchangeable, that the salon market was not a distinct submarket, and that price competition and price sensitivity exists across the entire retail market for shampoos and conditioners. (509 F. Supp. at 375) In the lights of those findings, and the record as a whole, no jury could reasonably find that Jhirmack is subject only to intrabrand competition and possesses significant market power. See Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1388 (9th Cir. 1981). Based on this record, the restrictions complained of must be held as a matter of law not to constitude an unreasonable restraint of trade.

2. Vertical Price Fixing

The JBL plaintiffs also assert a vertical price fixing claim cognizable as a *per se* violation. In substance, the argument is that by controlling diversion to discounting wholesalers and retailers, Jhirmack stabilized and maintained resale prices.

The evidence shows that Jhirmack took steps to prevent diversion of its products, frequently at the instance of its distributors who complained when products appeared in other stores at discount prices. There is no evidence, however, that Jhirmack fixed the resale prices for its products or enforced compliance with a particular price schedule.[1/]

Plaintiffs' argument is premised on *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), and *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). In *Bausch & Lomb* the defendant Soft-Lite Lens Company, Inc., which distributed

lenses specifically manufactured for it by Bausch & Lomb, required its distributors to charge published list prices and its retailers to sell at the prevailing local prices. An elaborate system of control and surveillance was used to enforce adherence to this price-fixing scheme. This price-fixing conduct was held to constitute a *per se* violation. The *Schwinn* case held vertical territory and customer restraints upon the sale by distributors of goods purchased by them from Schwinn to be a *per se* violation. That holding was overruled in *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977), a case plaintiffs did not feel it necessary to cite in this connection.

The undisputed facts show that the restrictions in the JBL case were nonprice restrictions. Jhirmack did not establish or enforce resale prices. Price and nonprice restrictions may ref-

lect the same motivation on the part of a manufacturer, but they generate entirely dirrerent economic consequences. Restrictions on price have a tendency to reduce price competition, interbrand as well as intrabrand. Restrictions on customers and territory tend to restrict intrabrand competition only and have the potential of strengthening interbrand competition. This reasoning led the Court in GTE Sylvania to overrule Schwinn and reinstate the rule of reason as the standard governing nonprice vertical restrictions.2/ Plaintiffs' contention is wholly without merit and must be rejected.

B. The Fraud Claim

Plaintiffs contend that Jhirmack made fraudulent or negligent misrepresentations in connection with the setting of minimum purchase quotas. The distributor agreement provided that distributors were required to purchase a minimum quantity of products each month, the amounts being subject to change from time to time by Jhirmack. Appendix C to the agreement sets

forth the agreed minimum quantities and the agreement states that the distributor "acknowledges that the minimum purchase requirements provided herein are fair, just and reasonable." Plaintiffs contend that the latter statement amounts to a fraudulent representation by Jhirmack on the theory that the specified quotas were a representation as to the minimum revenues that distributors could anticipate.[3]

It is doubtful that quotas incorporated into a distributors agreement afford a basis for a later fraud claim based on the distributor's failure to attain them. It is not necessary to reach that issue here, however, inasmuch as plaintiff's showing is in any event fatally defective. Plaintiffs have failed to present facts on two essential elements: that Jhirmack made any representation negligently or with intent to defraud, see Kelly Tire

Service, Inc., v. Kelly Springfield Tire Co., 338 F.2d 248, (8th Cir. 1964); and that plaintiffs acted in reliance on the alleged representations.

Accordingly, Jhirmack is entitled to summary judgment on the fraud claim.

II. The Booth Action

The Booth action was filed in February 1980, shortly after plaintiffs' distributor agreements had been terminated. The precipitating cause of the termination was plaintiffs' refusal to execute new distributor agreements with Jhirmack. The new form of agreement had been tendered by Jhirmack to its distributors after it had entered into an agreement with International Playtex, Inc., ("Playtex"), appointing Playtex as the exclusive distributor of Jhirmack products to drug stores and other OTC outlets.

The Booth complaint contains 49 pages of rambling and often obscure recitals of

numerous grievances, cast mostly in argumentative and conclusory language. It is difficult to discern a cognizable antitrust violation or other cause of action.[4/] The gravamen of the complaint, however, appears to be the charge that Jhirmack and Playtex entered into a conspiracy to terminate plaintiffs in order to enable Playtex to sell Jhirmack products to OTC outlets, thereby depriving plaintiffs of the exclusive territories granted under the distributor agreements. (Complaint pp. 5-7) In addition, these plaintiffs assert certain related tort and contract claims under state law.

In its prior ruling, the Court observed that the charges made by the Booth plaintiffs did not appear to set forth injury of the type the antitrust laws were intended to prevent. That observation was based not only on the complaint but on the argument of Booth's counsel at

trial to the effect that the violation consisted of the destruction of the distributors' exclusive distribution of Jhirmack products by the entry of Playtex as a distributor to the OTC market. (509 F. Supp. at 365-66)

Following issuance of the Court's ruling on the market issues and defendants' motions for summary judgment, these plaintiffs in their response for the first time asserted a per se price fixing violation.

A. The Antitrust Claim

The argument which these plaintiffs now advance in opposition to defendats' motions for summary judgment is that the Jhirmack-Playtex agreement is a per se violation of Section 1 because it is designed to prevent distributors such as plaintiffs from engaging in price competition in the OTC market. The argument goes that Booth was ready, willing and able to enter the OTC market, that the new agreement with

Playtex assigned the OTC territory exclusively to Playtex, that Booth's old distributor agreement was terminated when Booth was unwilling to sign a new agreement recognizing Playtex as the exclusive OTC distributor, and that these actions were "price motivated" in that they were intended to protect Playtex against price competition.

Viewing the evidence in the light most favorable to plaintiffs, it shows that Playtex secured the exclusive right to distribute to the OTC market, that it was concerned about the effect of diversion by distributors on its volume and the prices it could charge, and that it sought to have Jhirmack stop such diversion. Playtex's strategy was to price its products at relatively high levels compared to other OTC prices and it was concerned that diverting distributors could undersell it.

The Supreme Court has stated that the <u>per se</u> rule applies only to "certain agreements or practices" which are

> so "plainly anticompetitive," <u>National Society of Professional Engineers v. United States</u>, 435 U.S. 679, 692 (1978); <u>Continental T.V., Inc. v. GTE Sylvania Inc.</u>, 433 U.S. 36, 50 (1977), and so often "lack . . . any redeeming virtue," <u>Northern Pac. R. Co. v. United States</u>, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

<u>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</u>, 441 U.S. 1, 8 (1979). This is the standard governing the analysis of the Booth plaintiffs' claim of a <u>per se</u> violation based on an alleged conspiracy to restrain price competition.

The Court in <u>Broadcast Music</u> also cautioned against automatic application of the <u>per se</u> rule to any practice that may relate to or affect price.

> More generally, in characterizing this conduct under the <u>per se</u> rule, out inquiry must focus on

whether the effect and, here because it tends to show effect, see <u>United States v. United States Gypsum Co.</u>, 438 U.S. 422, 436 n. 13 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy--that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and to render markets more, rather than less, competitive." Id., at 441 n. 16; See <u>National Society of Professional Engineers v. United States</u>, 435 U.S. at 688; <u>Continental T.V., Inc. v. GTE Sylvania Inc.</u>, 433 U.S., at 50 n. 16; <u>Northern Pac. R. Co. v. United States</u>, 356 U.S., at 4.

* * *

Finally, we have some doubt--enough to counsel against application of the <u>per se</u> rule--about the extent to which this practice threatens the "central nervous system of the economy," <u>United States v. Socony-Vacuum Oil Co.</u>, 310 U.S. 150, 226 n. 59 (1940), that is, competitive pricing as the free market's means of allocating resources. Not all arrangements among actual or

> potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

441 U.S. at 19-20, 23.

The recent decision in *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981), affirming summary judgment for defendant, applies this reasoning to a closely analogous case. Plaintiff, a foreign car dealer, complained that defendant, a distributor of Fiat automobiles, had refused to appoint plaintiff as a Fiat dealer pursuant to an agreement with the existing Fiat dealer in the area. Because Fiat's share of the relevant mar-

ket was insignificant, the issue was whether defendants' conduct could be held to be illegal per se. The lower court had determined that Fiat's share of total automobile registrations in the area was less than 2% and that its share of the foreign car market did not exceed 5.2%. 637 F.2d at 1379.

The court observed that no evidence had been offered to contradict the finding that the product market was characterized by vigorous interbrand competition which would not be affected by a failure to increase intrabrand competition for a product with a very small market share. 637 F.2d at 1387. The Court also observed that "an important factor" in defendant's decision not to appoint plaintiff as an additional dealer was "its desire to stimulate [an existing distributor's] sales, i.e., its desire to promote interbrand compe-

tition." Noting that the antitrust laws are primarily concerned with interbrand competition, and that the failure to increase intrabrand competition by failing to appoint plaintiff a dealer in the circumstances presented not only "was not necessarily pernicious" but had the potential of benefitting competition by increasing the sales of defendants, the court determined that application of the _per se_ rule would be unjustified. 637 F.2d at 1387-88.

The reasoning of the court of appeals is applicable here. As heretofore discussed, Jhirmack's share of the relevant market is too insignificant for any restraint on intrabrand competition to have a substantially adverse effect on interbrand competition. _See_ _Mutual Fund Investors v. Putnam Management Co._, 553 F.2d 620, 627 (9th Cir. 1977). For plaintiffs to recover, therefore, they

must come forward with evidence to show that "the challenged conduct clearly had, or was likely to have, a pernicious effect on competition and lacked any redeeming virtue." Ron Tonkin, 637 F.2d at 1387.

The "conspiracy" under attack here is the October 1979 agreement between Jhirmack and Playtex appointing Playtex the exclusive distributor of Jhirmack products to OTC and other non-professional outlets. Jhirmack's products had not theretofore been officially distributed to OTC outlets, having been generally limited to professional outlets except for sporadic diversion.

The primary effect of the Jhirmack-Playtex agreement on competition in OTC channels was to add the competitive activity of a major distributor and to increase the amount of Jhirmack products available to consumers in OTC outlets.

On its face, therefore, the agreement thus stood to enlarge trade and augment competition with other brands of beauty products. Moreover, the agreement also provided a new source of intrabrand competition for Jhirmack products sold in salons.[5/] Indeed, it was the threat of new competition from OTC distribution of Jhirmack products which motivated the Booth plaintiffs to file this action.[6/]

Defendants have demonstrated that the challenged agreement was likely to promote both interbrand competition and one kind of intrabrand competition. The only negative effect plaintiffs point to is that another potential kind of intrabrand competition (by their entry into the OTC market) was foreclosed. Even drawing all reasonable inferences in favor of plaintiffs, it cannot be said that they have presented significant probative evidence that the Jhirmack-Playtex agreement

"clearly had, or was likely to have, a pernicious effect on competition and lacked any redeeming virtue." Ron Tonkin, 637 F.2d at 1387.

Plaintiffs seek to equate this case with Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979). There the plaintiff, a dealer in kitchen cabinets, was terminated by the manufacturer a few month after it had become a dealer following a complaint by a competing dealer to the manufacturer that the plaintiff was discounting cabinets. On appeal from the trial court's grant of summary judgment for defendants, the court stated the issue to be

> whether the conduct at issue here--a manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitors at the request of a competitor--should be classified as a per se violation of the Act. Following Justice Black's formulation, the activity under consideration in this case

> must be seen to have a pernicious effect on competition without having any redeeming virtue. The pernicious effect is apparent: one competitor has succeeded in excluding another from dealing in United cabinets through a combination with United and its agent, and, in so doing, has eliminated the possibility of price competition by the foreclosed dealer.

595 F.2d at 166. _See_ _Northern Pacific Railroad Co. v. United States_, 356 U.S. 1, 5 (1958).

The _Cernuto_ court noted that the _per se_ rule has not been applied to unilateral decisions by a manufacturer in "arranging its distribution structure," observing, as an example, that it is "[neither] uncommon . . . [nor] illegal for a manufacturer to enter into contracts that provide particular customers exclusive rights to sell the product in designated geographical areas." 595 F.2d at 167. The court found the conduct alleged in that case to be distinguishable from generally accepted

manufacturers' practices in two ways: first, because the manufacturer allegedly did not act on its own to pursue its own marketing strategy to compete with other manufacturers, and second, because the conspiracy was alleged to be motivated by price considerations. The relevance of the first factor is that action taken by the manufacturer at the instance of its customers results in restraints primarily horizontal in nature, tending to suppress competition between its customers. The relevance of the second is that action having the purpose and effect of restraining price movement and the free play of market forces is illegal _per se_. 595 F.2d at 168-69. _See also_ _Contractor Utility Sales v. Certain-Teed Products_, 638 F.2d 1061, 1072 (7th Cir. 1981).

As authority for application of a _per se_ rule, _Cernuto_ is distinguishable. First, the nature of the termination alleged here

is different from that giving rise to the _per se_ analysis in _Cernuto_. This is not a case of terminating a discounter. Plaintiffs do not allege that any of them sold at discounted prices or sold to OTC outlets at all, or that they had made any preparations to do, or that they had been identified by defendants as likely discounters. What happened to plaintiffs did not happen because of anything they had done, in contrast to the facts alleged in _Cernuto_.

Nor were plaintiffs' distributorships simply taken away as in _Cernuto_. Plaintiffs were offered revised distributorship agreements confirming them as exclusive distributors to the customers they had.

Plaintiffs found these contracts substantially less desirable and refused to sign them. It was only after plaintiffs refused to sign that Jhirmack terminated them. Plaintiffs here faced a situation similar to that in Contractor Utility Sales v. Certain-Teed Products, 638 F.2d 1061, 1071-73 & n. 9 (7th Cir. 1981). There plaintiff argued that defendant's actions towards plaintiff during a certain period were "similar, in terms of anti-competitive effects, to the termination of an existing dealer," and should receive the same *per se* analysis. The court, however, stated that while defendant's conduct "may have reduced [plaintiff's] sales volume and produced unacceptable anticompetitive effects," the ab-

sence of a "complete termination" precluded application of _per se_ analysis based on the rule in _Cernuto_. The _per se_ analysis in _Cernuto_ is inappropriate here for the same reason.

Second, the termination here did not have the "pernicious" effect on competition as did the termination in Cernuto. There the net result of the termination was one less distributor and one less source of intrabrand price competition. In this case, as discussed above, the Jhirmack-Playtex agreement has substantial pro-competitive aspects and could not be called "pernicious."[7/] Inasmuch as the antitrust claim asserted is limited to a _per se_ violation, summary judgment must be granted.

B. The Tort Claims

Breach of Covenant of Good Faith and Fair Dealing

Plaintiffs premise their claim for breach of a covenant of good faith and fair dealing on the assertion that "Jhirmach terminated plaintiffs for refusing to accede to its illegal agreement with Playtex." (Memo., p. 30.) In light of the preceding disposition of plaintiff's antitrust claim, this claim necessarily fails.

Inducing Breach of Contract

Plaintiffs complain that Playtex tortiously induced Jhirmack to breach its contract with existing distributors in two ways: by appointing Playtex as an additional distributor, and by subsequently barring existing distributors from any part of the OTC trade. To recover on this claim plaintiffs must prove (1) that a valid contract existed; (2) that Playtex

had knowledge of the contract and intended to induce its breach; (3) that the contract was in fact breached by Jhirmack; (4) that such breach was proximately caused by Playtex's unjustified and wrongful conduct; and (5) that as a result plaintiffs suffered damage. Richardson v. La Rancherita La Jolla, Inc., 98 Cal.App.3d 73, 80, 159 Cal.Rptr. 285 (1980).

Plaintiffs' evidence is insufficient to withstand summary judgment on this claim. Defendants' uncontradicted evidence shows that Jhirmack made its decision to engage a new distributor for the OTC trade before Playtex knew of this plan. The alleged breach therefore could not have been proximately caused by Playtex. Defendants also show without contradiction that Playtex understood that the existing agreements limited existing distributors to salon customers and that appointing an OTC distributor therefore would not breach the existing

distributor agreements. While the meaning of the contract itself presents a factual issue, as discussed below, defendants' evidence thus suffices to show that Playtex did not intend to procure its alleged breach. Defendants are accordingly entitled to summary judgment on this claim.

C. The Contract Claim

Plaintiffs claim that their distributor agreements granted them exclusive geographical territories and that Jhirmack breached the agreement when it appointed Playtex as its OTC distributor for the entire country in October 1979. The dispute centers on the following paragraph of the distributor agreement:

> 1. TERRITORY. PRODUCER hereby grants to the DISTRIBUTOR the exclusive and non-transferable license to market and to promote sales of PRODUCER'S products. DISTRIBUTOR shall be primarily responsible for selling PRODUCER'S products to beauty salons, the owners, operators, and apprentices; beauty schools, the owners,

> teachers and students; barber schools, the owners, teachers and students; men's hairstyling establishments; barber shops, the owners, barbers and apprentices, in and throughout the area described in Exhibit "A" attached hereto and incorporated herein by reference. (This area shall be hereinafter referred to as the "territory"). DISTRIBUTOR shall exclusively devote its entire time and use its best efforts to exploit, promote and sell PRODUCER'S products to said customers within the territory. The license granted to DISTRIBUTOR is an exclusive licence in that the PRODUCER will not appoint another distributor within the territory.

Exhibit A attached to each agreement specifies a georgraphical [sic] area, such as "The entire state of Utah."

Defendants argue that the distributor agreement defined the distributors' territories to exclude the OTC market, so that in appointing Playtex as its OTC distributor Jhirmack did not violate the promise of exclusivity. In support of this argument, defendants refer to the

language quoted above which specifies that the distributor is to "exclusively devote its entire time" to selling Jhirmack products to beauty salons and other customers in the professional salon trade. Defendants contend that the definition of territory contained in the agreement means merely that Jhirmack could not appoint another distributor to service the same class of professional customers in a given area.

In opposition, the Booth plaintiffs argue that the agreement's promise of exclusivity pertains to the entire geographical area described in Exhibit A of each agreement. Under this interpretation, Jhirmack's appointment of a distributor like Playtex to service OTC outlets within those geographical areas would violate the agreement not to appoint another distributor in the territory, regardless of whether the agreement enabled

the distributors themselves to sell to OTC outlets.

These conflicting interpretations of the exclusive territory clause raise factual issues requiring a trial on the contract claim.

Alternatively, defendants move for judgment on the contract claim on the ground that enforcement of the distributor agreement to prohibit sales of Jhirmack products to OTC outlets would be contrary to law and public policy. It is true that in the earlier trial in this case the Booth plaintiffs appeared to suggest such an interpretation of the agreement. Plaintiffs' present position, however, is that their agreement did not prohibit Jhirmack from marketing its products in OTC channels but merely required that if such marketing were to be undertaken, it would have to be through Jhirmack's existing distributors.

So stated, the purpose of the agreement cannot be said to offend law or public policy.

Defendants further contend that the Booth plaintiffs' contract claim is barred by the limitations period contained in the distributor agreement. Section 9 of the agreement provides that "no actions . . . may be brought by Producer, or Distributor, against each other, arising out of or relating to this Agreement more than thirty (30) days after a cause of action occurs."

Plaintiffs argue, however, that the distributor agreement is a "contract for sale" within the meaning of California Commerical Code Section 2725, which provides that the parties to such a contract may not reduce the period of limitation to less than one year.[8/] If plaintiffs are correct, the 30 day limitation period contained in the contract is not enforce-

able. The issue turns, then, on the characterization of the distributor agreement.

According to Commercial Code Section 2106, the term "contract for sale" "includes both a present sale of goods and a contract to sell goods at a future time." Section 6 of the distributor agreement states that it "constitutes the entire understanding and agreement between the parties with respect to the sale of Producer's products." Section 2 provides that "[t]he Distributor shall purchase Producer's products . . . at prices scheduled on the Producer's price list," which "Producer, in its sole opinion, may change from time to time." A price list is attached as an exhibit to the agreement. Section 3 requires monthly minimum purchase requirements, set forth in detail in an exhibit appended to the agreement.

Thus the distributor agreement commits the distributor to purchasing minimum amounts of Jhirmack products within certain fixed periods, and defines the terms and conditions for those purchases. While the agreement contains terms not relating strictly to sales, its purpose and effect is clearly to provide for the sale of goods by Jhirmack to its distributors. The distributor agreement is therefore a contract to sell goods at a future time and hence a "contract for sale" within the meaning of Commercial Code §§ 2106 and 2725. See Hachten v. Stewart, 42 Cal. App.3d Supp. 1, 116 Cal.Rptr.631 (1974) (gasoline dealer's contract); Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 98, 141 Cal.Rptr. 157 (1977) (gasoline dealer's contract); Warner Motors, Inc. v. Chrysler Motors Corp., 5 U.C.C.Rep.Serv. 365 (E.D. Pa. 1968) (automobile dealership agreement). Under §2725, the 30 day limitation

period provided in the contract is unenforceable, and does not bar plaintiffs' breach of contract claim.[9/]

If at the trial it is found that Jhirmack breached its contract with plaintiffs by appointing Playtex as its OTC distributor in October 1979, the issue of the proper measure of damages will arise. The agreement entitled either party to terminate on 30 days' written notice. Jhirmack gave plaintiff written notice of termination in December 1979, and plaintiffs do not contend that the notice of termination was not effective. Plaintiffs' damage claim would therefore be limited to lost profits during the period from the date of the alleged breach (October 1979) to the effective date of the termination (January 1980).

ORDER

1. Summary judgment is granted in favor of defendant Jhirmack Enterprises,

Inc. in action C-78-1227, defendant to recover costs.

2. Summary judgment is granted in favor of defendants Redding, Schwartz, Playtex, Smilow, and Esmark and against plaintiffs on all claims in action C-80-0249, defendants to recover costs.

3. Summary judgment is granted in favor of defendant Jhirmack Enterprises, Inc. on all claims in action C-80-0249 except the claim for breach of contract.

4. Further proceedings will be governed by the following provisions:

a. The court will hold a pretrial conference on the remaining claim on Friday, August 28, 1981, at 3 p.m.

b. Plaintiffs in action C-80-0249 are directed to serve and file by August 21, 1981, their pretrial statement with respect to their con-

tract claim, setting forth

i. The name of each witness to be called and a brief summary of the testimony to be given;

ii. A description of each exhibit to be offered;

iii. A detailed computation of the damages claimed, together with specific references to the source for each figure used in the computation.

iv. Any additional discovery required for trial.

c. Jhirmack shall serve and file by August 21, 1981, a pretrial statement with respect to any counterclaim it intends to take to trial, conforming to the preceding paragraph b.

d. Trial of all remaining claims will begin on September 21, 1981, at 9:30 a.m.

IT IS SO ORDERED.

DATED: July 9, 1981.

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

FOOTNOTES

1/ Plaintiffs' claim of resale price maintenance has heretofore been dismissed. Moreover, at the prior hearing, counsel represented that no claim of a price-fixing agreement was being made. (Tr. 1137)

2/ See 433 U.S. at 51-58, notes 18 and 19.

3/ See second amended complaint, para. VIII, IX.

4/ At oral argument counsel for these plaintiffs advised that the only claims now being asserted by them were a horizontal price fixing claim under federal and state antitrust laws, a claim against Jhirmack for breach of the distributor agreement and breach of a convenant of good faith, and a claim against Playtex for inducing breach of contract.

5/ Another factor considered by the court in Ron Tonkin was the motivation behind the challenged conduct. Regarding the negotiation of the Jhirmack-Playtex agreement, Playtex General Counsel Joel Coleman testified, "I knew that getting an exclusive right to sell to the OTC trade was essential to us . . . [the effect of the agreement was to] grant Playtex the rights that it needed." (Dep. of July 25, 1980) Playtex evidently considered the restriction complained of necessary to achieve the procompetitive results envisioned. As the court said in Ron Tonkin, 637 F.2d at 1387, "The courts have recognized the benefit to encouraging the promotion of interbrand competition which occurs by allowing a business to distribute its products in a particular fashion," citing GTE Sylvania, 433 U.S. at 54.

6/ See 509 F. Supp at 365-66, note 3; complaint pp. 6-7.

7/ For the same reasons, other authorities cited by plaintiffs are inapposite. See Alloy Int'l. Co. v. Hoover-NSK Bearing Co., Inc., 635 F.2d 1222 (7th Cir. 1980); Girardi v. Gates Rubber Co. Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963). United States v. General Motors Corp., 384 U.S. 127 (1966), involved a conspiracy between an association of Chevrolet dealers and General Motors to force dealers to stop selling to discounters by policing their sales, forcing them to repurchase cars and threatening termination.

8/ California Commercial Code § 2725 provides in relevant part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

9/ Jhirmack cites Hancock Oil Co. v. McClellan, 135 Cal.App.2d 667 (1955), which held a gasoline dealership contract not to be a "contract of sale." That case is distinguishable. First, as the case preceded the adoption of the Uniform Commercial Code in California, the court was not concerned with the definition of "contract for sale" in §2106, nor does the opinion contain a cognate analysis. Second, the contract in that case defined the terms of future sales with much less precision than the contract here; the court found it "too uncertain to constitute a valid contract." 135 Cal.App.2d at 670.

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-78-1227 WWS

JBL ENTERPRISES, Inc., et al.,

Plaintiffs,

v.

JHIRMACK ENTERPRISES, INC.,

Defendant.

CONSOLODITED FOR LIMITED TRIAL WITH

Case No. C-80-0249 WWS

AL BOOTH, et al.,

Plaintiffs,

v.

JHIRMACK ENTERPRISES, INC., et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF OPINION ON ISSUES OF RELEVANT MARKET, MARKET SHARE AND LAWFULNESS OF TYING ARRANGEMENT

William W. Schwarzer,
District Judge,

Presiding.

Filed February 25, 1981

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF OPINION ON ISSUES OF RELEVANT MARKET, MARKET SHARE AND LAWFULNESS OF TYING ARRANGEMENT

I. PROCEDURAL BACKGROUND

JBL Enterprises, Inc., et al. v. Jhirmack Enterprises, Inc., C-78-1227-WWS. This action is brought by three former distributors, JBL Enterprises, Inc. (formerly doing business as Jhirmack of Utah); Jean Robinson (formerly doing business as Jhirmack of Idaho and Jhirmack of Boise); and Lois Jean Million (formerly doing business as Jhirmack of Indiana and Jhirmack of North Central Indiana), against Jhirmack Enterprises, Inc. ("Jhirmack"), the manufacturer of a line of beauty and cosmetic products sold throughout the United States under the name "Jhirmack" and formerly distributed by plaintiffs.

The three plaintiffs allege that Jhirmack violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act by imposing unreasonable customer and ter-

ritorial restrictions, tying undesired products to the right to purchase desired products and to the right to use Jhirmack's name, and wrongfully terminating distributorships. Additional counts allege breach of contract, fraud, negligent misrepresentation and interference with business.

Alfred Booth, et al. v. Jhirmack Enterprises, Inc., et al., C-80-0249-WWS. This action is brought by two former distributors of Jhirmack, Jhirmack of Washington, D.C., Inc.; Thelma R. Bean and Alfred Booth, respectively president and vice president of Jhirmack of Washington, D.C., Inc.; Jhirmack of Southwestern Pennsylvania, Inc.; and Walter Cecchini, president of Jhirmack of Southwestern Pennsylvania, Inc., against Jhirmack; Mrs. Irene Redding, president and chief executive officer of Jhirmack; Albert L. Schwartz, Secretary-Treasurer of Jhirmack; Gary McCord, vice

president of Jhirmack for marketing; International Playtex, Inc. ("Playtex"); Joel E. Smilow, president of Playtex; and Esmark, Inc., the parent corporation of Playtex.

The Booth complaint alleges various antitrust violations arising out of the agreement between Jhirmack and Playtex assigning to Playtex the exclusive rights to distribute Jhirmack products nationally to over-the-counter outlets. Plaintiffs allege that the contract violates Section 1 of the Sherman Act, that Playtex and Jhirmack have monopolized, conspired to monopolize and attempted to monopolize in violation of Section 2 of the Sherman Act, that plaintiffs were wrongfully terminated in violation of Section 3 of the Clayton Act, that the option agreement between Playtex and Jhirmack violates Section 7 of the Clayton Act, and that Jhirmack committed various other antitrust violations including tying and

territorial restrictions. The remaining 16 counts of the complaint, based on the same facts, consist of counts of false labelling and interference with the Constitutional right of free association, and various pendent state claims including fraud, breach of contract, negligent and intentional interference with contract, intentional infliction of emotional distress, etc.

On June 12, 1980, pursuant to Fed.R. Civ.P. 42, the Court, with the consent of the parties, consolidated the two actions for a separate trial of all issues regarding (1) the relevant market, (2) defendant Jhirmack's share of the relevant market, and (3) whether Jhirmack instituted an unlawful tying arrangement as to any of its products. <u>See</u> Pretrial Order No. 1, a copy of which is attached as Exhibit A. The Pretrial Order reserved for later trial issues regarding justifi-

cation, causation, and damages for any proven tying arrangement, and other liability issues. On August 15 and September 12, 1980, pretrial conferences were held to discuss subsequent proceedings.[1/]

Pursuant to the provisions of paragraph 5 of the Pretrial Order, the parties made written submissions before the trial. Plaintiffs filed a joint trial brief, and narrative written statements by James Schilt, a financial analyst, on market share, Gary McCord, former vice president of marketing for defendant Jhirmack and himself a named defendant who settled with plaintiffs, on various marketing policies of Jhirmack; John Williams, president of plaintiff JBL Enterprises, Inc., on his company's experiences as a Jhirmack distributor; Walter Cecchini, plaintiff and president of plaintiff Jhirmack of Southwestern Pennsylvania, Inc., on his company's

experience as a Jhirmack distributor; and Alfred Booth, plaintiff and vice president of plaintiff Jhirmack of Washington, D.C., Inc., on his company's experience as a Jhirmack distributor.

Defendant Jhirmack filed a brief, and narrative written statements by Irene Redding, president and chief executive officer of defendant Jhirmack and a named defendant, regarding the relevant market and tying issues; Dr. G. Stephen Jizmagian, an economist, regarding the relevant market; Rafael Akyuz, vice president for research and development of defendant Jhirmack, on flexibility of production in the beauty and cosmetics industry; and Robert Cordell, vice president for manufacturing of defendant Jhirmack, on flexibility of production in the beauty and cosmetics industry.

Defendant Playtex filed a brief, and narrative written statements by Mark Lowenthal, director of marketing for the

Family Products division of defendant Playtex, on relevant market, Playtex's marketing analysis and decisions, and the effect of the Jhirmack-Playtex marketing agreement on competition; and Dr. James Carman, professor of business administration, on relevant market, Jhirmack's share of the relevant market, and the effect of the alleged restraint upon competition in the relevant market.

On September 22, 23, 24, and 25, 1980, and January 12, 1981, the relevant market, market share, and tying issues were tried to the Court. Mrs. Redding, Mr. McCord, Mr. Schilt, Mr. Williams, Mr. Lowenthal, Mr. Booth, Mr. Cecchini, Dr. Jizmagian, and Dr. Carman appeared, their written statements were received as exhibits and they were examined and cross-examined by counsel. The narrative written statements of Mr. Akyuz and Mr. Cordell were received as exhibits. Plaintiffs also called as a

witness John White, a beauty supply distributor and former sales manager and distributor coordinator for defendant Jhirmack. The parties have submitted briefs and oral argument has been heard. The ruling which follows constitutes the Court's findings of fact and conclusions of law on the foregoing bifurcated issues.

II. FACTUAL BACKGROUND

Defendant Jhirmack manufactures a line of hair care and beauty products which are distributed throughout the United States by licensed distributors. The company was founded in 1968 by Jheri Redding and his wife Irene Redding. Jhirmack introduced its first line of hair and beauty products in 1972. Presently shampoos and conditioners account for approximately 80% of its production. Jhirmack initially arranged to market its products to consumers exclusively through what are called professional outlets or the salon trade, con-

sisting of beauty salons, barber shops, hair styling establishments, beauty schools, barber schools, and beauty supply houses. Jhirmack assigned geographic areas to independent distributors, who were required to devote their best efforts to distribute Jhirmack products to professional outlets.

Although Jhirmack initially manufactured its products for resale exclusively through professional outlets, some of Jhirmack's products were "diverted" by distributors for eventual resale to consumers through other distributors and other types of outlets, including discount houses, drug, food, and department stores (referred to as "over-the-counter" or "OTC" outlets). Jhirmack received complaints from salon owners and distributors about instances of diversion to OTC outlets, and took steps to identify the distributors involved and to discourage this

activity.

Since 1974, Jhirmack, relying on the provision in the distributor agreements obligating distributors to comply with company policies and procedures, has required its distributors to place an initial order for a specified quantity of each new product. Under this "new product quota" program, Jhirmack calculated each distributor's quota based on the number of potential professional accounts in that distributor's territory. Jhirmack warned its distributors that it would not fill orders which did not include the new products required under the quota program, and on occasion has rejected orders for that reason.

In April 1978 Jhirmack cancelled the distributorship of plaintiff JBL Enterprises, Inc. JBL had refused over a period of several months to order certain new products as required under the quota program, and had participated in diverting Jhirmack

products to OTC outlets.

On October 9, 1979, Jhirmack arranged to market its products through OTC outlets by appointing Playtex exclusive distributor of its products "for all channels of trade excluding the professional salon trade." The agreement obligated Playtex to make certain expenditures for promotion and advertising of its Jhirmack products. Playtex presently distributes seven Jhirmack shampoo and conditioner products, including two shampoos and four conditioners known as the "Basic Six" (E.F.A. Shampoo, Gelave Shampoo, Moisture-pHlex Conditioner, pHinale Conditioner, N.C.A. Conditioner, and NutriPak Conditioner). These six products accounted for approximately 67 to 68% of Jhirmack's sales in 1977, 1978, and 1979.

Following the execution of the marketing agreement with Playtex, Jhirmack sent new distributorship agreements to its

existing distributors under which they were to continue the exclusive distribution of Jhirmack products through professional outlets but with the understanding that Playtex would soon begin operating as exclusive distributor of Jhirmack products to OTC outlets. The Booth plaintiffs are former Jhirmack distributors who were offered the revised distributorship contracts at that time but refused to sign them. Jhirmack terminated those plaintiffs' distributorships in December 1979.

This opinion addresses two issues:

(1) What is the relevant market for the purpose of determining whether the restraints allegedly imposed by Jhirmack on its distributors' selling outside of their territory and to purchasers other than professional or salon outlets, and the alleged tying arrangements, could be found to have an impact on competition; and

(2) Does Jhirmack's new product quota, requiring its distributors to place an ini-

tial order for each new product, constitute an unlawful tying agreement.

Part III of the opinion will deal with the first issue, part IV with the second.

III. THE ALLEGED RESTRAINTS ON CUSTOMERS AND TERRITORY-RELEVANT MARKET

For purposes of this opinion, the Court accepts the allegations of the complaints to the effect that Jhirmack imposed customer and territorial restrictions on the sale of its products by its distributors. Those restrictions are alleged to be unreasonable restraints of trade.[2/]

Under the rule of reason analysis, plaintiffs must demonstrate that defendant's alleged conduct had an impact on competition in the relevant market. In DeVoto v. Pacific Fid. Life Ins. Co., 618 F.2d 1340, 1344-45 (9th Cir.), cert. denied, 101 S.Ct. 206 (1980), the Ninth Circuit stated the controlling principles as follows:

> A crucial aspect of a plaintiff's case under the rule of

reason is a demonstration that the alleged conduct of the defendant had some market impact. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615, 73 S.Ct. 872, 883-84, 97 L.Ed. 1277 (1953); Associated Press v. United States, 326 U.S. 1, 27, 65 S.Ct. 1416, 1428, 89 L.Ed. 2013 (1945) (Frankfurter, J., concurring); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1247 (3d Cir. 1975). As this court recently stated, "Unless the alleged anticompetitive conduct is per se unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case . . . and the burden of establishing it lies on him." Gough v. Rossmoor Corp., 585 F.2d 381, 385 (9th Cir. 1978), cert. denied, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). This court and others have repeatedly emphasized that "[t]he antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" Brunswick Corp. v. Pueblo Bow-O-Mat, Inc. [sic], 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed. 2d 701 (1977)(quoted in Gough, supra, 585 F.2d at 386)(emphasis in original)(citation omitted), and therefore the plaintiff must show something more

> than simply an adverse effect on his own business; he must show "an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged." Gough, supra, 585 F.2d at 386. Absent per se violation, competitive injuries must be defined in terms of a discrete market.
>
> * * *
>
> The Supreme Court has stated that the appropriate focus in determining reasonableness under section 1 focuses on "the percentage of business controlled, the strength of the remaining competition, [and] whether the action springs from business requirements or purpose to monopolize." United States v. Columbia Steel Co., 334 U.S. 495, 527, 68 S.Ct. 1107, 1124, 92 L.Ed. 1533 (1948) (quoted in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615, 73 S.Ct. 872, 884, 97 L.Ed. 1277 (1953)).

The analysis must therefore begin with a determination of the relevant market, i.e., "the field of commerce in which the plaintiff was engaged." Gough, 585 F.2d at 389.

The burden of proving the relevant market rests on plaintiff. Id., 585 F.2d at 385. At the trial plaintiffs undertook to prove a relevant market comprising sales of shampoos and conditioners at retail by beauty salons and professional outlets. The Court rejects the market proposed by plaintiffs for two separate and independent reasons:

(1) It does not comprise the field of commerce in which plaintiffs are engaged;

(2) It does not constitute a distinct submarket within the market comprising the sale of shampoos and conditioners to consumers.

In the discussion which follows, the Court will analyze the evidence bearing on each of the foregoing propositions. Before doing so, however, a threshold issue must be addressed with respect to the

<u>Booth</u> action: whether the injury complained of is cognizable antitrust injury.

A. <u>The Booth Action Does Not Allege Injury Cognizable Under the Antitrust Laws</u>.

Section 4 of the Clayton Act (15 U.S.C. § 15) permits recovery of damages under the antitrust laws by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." To recover damages plaintiff "must prove <u>antitrust</u> injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." <u>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</u>, 429 U.S. 477, 489 (1977)(emphasis in original). As the Ninth Circuit stated in <u>Cal. Computer Products v. Intern. Business Machines</u>, 613 F.2d 727, 732 (9th Cir. 1979):

> Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts, since "[t]he antitrust

> laws . . . were enacted for 'the protection of competition not competitors,'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488, 97 S.Ct. at 697, quoting Brown Shoe Co. v. United States, 370 U.S. 294 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). See Oreck Corp v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir. 1978). Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor.

The Booth action appears to have been initiated in total disregard for these clear and settled principles. The substance of the complaint's charging allegations is contained in paragraph 17, which states in relevant part that

> defendants Jhirmack, Redding, Schwartz, McCord, and each of them, have engaged in agreements, combinations, and conspiracies with defendants Playtex, Smilow, Esmark, and other unnamed co-conspirators, and each of them, to unlawfully restrain the aforesaid trade and commerce in violation of Section 1 of the Sherman Act, and have specifically entered into a marketing agreement which would grant defendants

> Playtex, and each of them, [sic] a license to sell the Jhirmack products to retailers; have attempted to monopolize, have monopolized, and will continue to monopolize, and have combined and conspired to monopolize, the aforesaid trade and commerce in violation of Section 2 of the Sherman Act by wrongfully terminating without cause the Distributor Agreements of plaintiffs, and each of them, in order to allow defendants Playtex, Smilow, Esmark, unnamed conspirators, and each of them, to enter the territory of plaintiffs and to market said Jhirmack products over-the-counter in retail stores, thereby competing unfairly and substantially lessening competition and tending to create a monopoly in the aforesaid trade and commerce in violation of Section 3 of the Clayton Act.

Paragraph 18 enlarges on these allegations, complaining that because of Jhirmack's agreement with Playtex, providing for the distribution of Jhirmack products by Playtex through OTC channels in addition to the existing distribution to professional outlets by Jhirmack's own distributors,

plaintiffs lost the exclusive territories and markets they had developed in the salon trade.

These allegations on their face do not state a claim actionable under the antitrust laws.[3/] Even if, as the Booth plaintiffs claim, their ability to sell Jhirmack products to salons has been injured by Playtex's distribution of Jhirmack shampoos and conditioners to OTC outlets, given the preference of salons to sell brands having no OTC distribution, that injury results from an increase in competition, not a restraint on competition. The antitrust laws are intended to protect competition, not individual competitors. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978). Regardless of the outcome of the relevant market analysis, the Booth plaintiffs would be precluded from recovering for injury to their businesses for failure to show anti-

trust injury under Brunswick. See BBD Transportation Co. v. Southern Pacific Transportation Co., 627 F.2d 170, 172 (9th Cir 1980); Murphy Tugboat Co. v. Crowley, 454 F.Supp. 847, 852 (N.D. Cal. 1978)(on appeal). This matter will be considered in further proceedings as provided below.

Apart from the foregoing defect, however, the Booth action would be governed by the same relevant market analysis as the other actions discussed in the following sections.

B. The Relevant Market Comprises the Sale of Beauty Products to Professional Outlets.4/

Under Gough v. Rossmoor Corp., the relevant market consists of the field of commerce in which plaintiff is engaged. 585 F.2d at 389. The initial step in the rule of reason analysis must be the "consideration of the impact of the restraint on the competitive conditions within the field of commerce

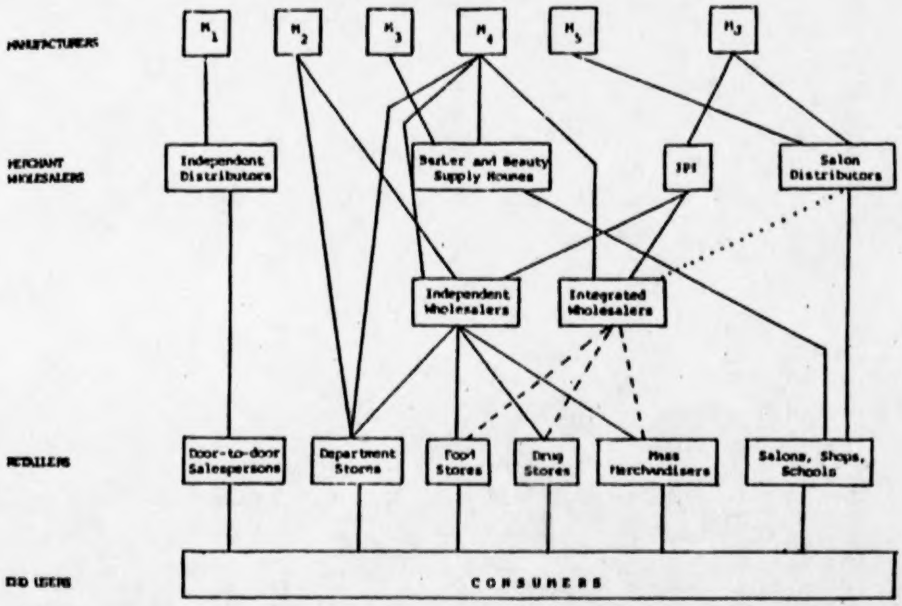
in which the plaintiff was engaged."
Id.

Plaintiffs were engaged in the distribution and sale of beauty products, principally but not exclusively shampoos and conditioners, to beauty salons and other types of professional outlets. The alleged restraints affected plaintiffs in the wholesale distribution of Jhirmack products. Thus, JBL's first amended complaint alleges that plaintiffs' distributorship agreements with defendant Jhirmack were "subject to unreasonable territorial and customer restraints, thereby precluding its distributors from free and unrestricted competition." (p.4) The customer restraint alleged was the specification in the distributorship agreement that distributors were to sell Jhirmack products to beauty salons, beauty schools, barber schools, and men's hairstyling establishments. Plaintiffs complain that they were not allowed to sell Jhirmack pro-

ducts to other distributors. This restriction had the effect of "eliminating the discounting of defendant's products by distributors, subdistributors, beauty and barber supply houses, cash-and-carry stores, salons, discount houses, drug stores and other entities . . . thereby precluding its distributors and other sellers of the products from free and unrestricted competition." (p.4) Even if the effects of any restraint may have been felt throughout the chain of distribution, the impact of the alleged territorial and customer restrictions fell upon plaintiffs in their sales to professional outlets.

The distribution of shampoos and conditioners, and other beauty products as well, occurs through several channels, as the following diagram shows:

VERTICAL DISTRIBUTION FOR SHAMPOOS AND CONDITIONERS



(Def. Ex. IPI-B)

Plaintiffs, at least according to the position they have taken in this trial, sell only to salon and other professional outlets. That field of commerce is distinct from other channels of distribution. Plaintiffs compete with other so-called single line distributors, i.e., distributors carrying the products of only a single manufacturer. They also compete with barber and beauty supply houses, or jobbers, which carry a number of different lines for distribution to the professional trade. Finally they compete to a minor extent with those manufacturers who sell directly to the professional trade.

The relevant market in which plaintiffs compete - and in which the impact of any restrictive practice must be evaluated - is therefore the market for the sale of relevant products to the professional trade. <u>See</u> <u>Tire Sales Corp. v. Cities Service Oil Co.</u>, 410 F.Supp. 1222 (N.D. Ill. 1976)(rele-

vant market defined as sales of tires, batteries and accessories to service stations and other retail outlets in South Chicago); South End Oil Co. v. Texaco, Inc., 237 F.Supp. 650 (N.D. Ill.1965)(relevant market consisted of discount houses and other retailers to which plaintiff sold).

Plaintiffs contend that the relevant products must be limited to shampoos and conditioners. They argue that shampoos and conditioners represent about 80% of Jhirmack's sales, and that the Playtex arrangement for OTC distribution applies only to shampoos and conditioners.[5/] Plaintiffs rely on the general principle that the relevant product market consists of "those commodities reasonably interchangeable by consumers for the same purpose." United States v. E.I. du Pont & Co., 351 U.S. 377, 395 (1956).

The principle of reasonable inter-

changeability must, however, be applied with reference to the specific market involved. While shampoo and lipstick are, of course, not interchangeable for the end user of the product, the relevant market here is not the sale to the end user but the sale to professional outlets. The evidence establishes that professional outlets, as well as the manufacturers and distributors who serve them, tend to deal in the entire range of beauty products. Professional outlets purchase full lines of beauty products from their suppliers, including shampoo, hair conditioner, hair spray, hair color, permanents, skin care products, cosmetics, and fragrances.[6/] Sellers at the several levels of distribution compete on the basis of manufacturers' brands or lines spanning the beauty products field. The ten largest manufacturers selling to the salon trade produce cosmetics as well as hair products, and six of those

ten also produce fragrances. Manufacturers like Jhirmack have been introducing more cosmetic products to fill out their lines, taking advantage of brand loyalty carrying over from one category of beauty products to another. Revlon, for example, has benefited in the sale of hair products from its reputation as a manufacturer of cosmetics. As one witness put it, "It's part of the business to have a full line." Jhirmack itself sells shampoo, conditioner, hair color, permanents, skin care products, cosmetics, and fragrances. At the wholesale level both types of salon distributor, beauty supply houses and single line distributors, handle the entire range of beauty products. Single line distributors carry a single manufacturer's line; beauty supply houses the lines of a number of manufacturers. Thus not only Jhirmack distributors but their competitors carry full lines of beauty products, as do their customers at the retail level.

In arguing that the relevant market must be limited to shampoos and conditioners, plaintiffs also rely on <u>United States v. Bethlehem Steel Corp.</u>, 168 F.Supp. 576 (S.D.N.Y. 1958), and <u>Crown Zellerbach Corp. v. F.T.C.</u>, 296 F.2d 800 (9th Cir. 1961), <u>cert. denied</u>, 370 U.S. 937 (1962). In <u>Bethlehem Steel</u> the United States sought to enjoin a merger of the second and sixth largest steel corporations. Defendants contended that a number of distinct finished steel products manufactured by the two companies constituted a single relevant line of commerce because steel producers had the capacity to allocate ingot supply among finishing facilities according to demand. The Court rejected this production flexibility argument, finding that in practice "steel producers have not been quick to shift from product to product in response to demand. Moreover, the evidence establishes that the continuing relationships

between buyers and sellers in the steel industry make such shifts unlikely." 168 F. Supp at 592.

In Crown Zellerbach the Ninth Circuit reviewed an order of the Federal Trade Commission directing Crown Zellerbach to divest itself of a smaller paper company which it had acquired. Crown Zellerbach argued that production flexibility created a relevant product market consisting of all the types of paper which standard paper-making machinery could be adapted to produce. The court rejected the production felxibility argument, citing Bethlehem Steel and saying that "[w]hat was turned out of the Fourdrinier machines depended altogether on what orders [the acquired company] had and what it knew it could sell. What those orders were and what it found a market for were presumably the products which it did sell." 296 F.2d at 812.

In the instant case, however, it is

not the manufacturers' production flexibility that supports treating salon beauty products as a single line of commerce constituting the relevant market. Rather it is the way in which these articles move at the wholesale level and compete as a single line of products. Lipstick, for example, although having a different end use from shampoos, is made by the same manufacturers and distributed to salons as a part of a line which includes shampoo. A similar product market comprehending a range of distinct products was found in A.G. Spalding & Bros., Inc. v. F.T.C., 301 F.2d 585, 604 (3d Cir 1962), aff'g 56 F.T.C. 1155. There the court found higher priced athletic goods to be a relevant market where the largest manufacturers each made a full line of goods and each grouped its line of products together for promotion and distribution. See United States v. Philadelphia National Bank, 374 U.S. 321, 356 (1963)(relevant

product market defined as "cluster" of products and services provided by commercial banks); United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350, 360 (1970)(same product market as in Philadelphia National Bank); United States v. Grinnell, 384 U.S. 563, 573 (1966)(relevant product market defined as cluster of accredited central station alarm services); United States v. Hughes Tool Co., 415 F. Supp. 637, 641 (C.D. Cal 1976)(relevant product market defined as "cluster of specialized surface rotary drilling tools").

The evidence, therefore, compels a finding that for purposes of these actions the relevant market comprises the sale of beauty products, including but not limited to shampoos and conditioners, to beauty salons and other professional outlets. Plaintiffs have produced no data to reflect the share of that market held by Jhirmack, or Jhirmack products. The

evidence in the record does, however, permit the Court to arrive at an approximation sufficient to support a finding.

Initially, it must be noted that none of the market share data in the record inspire confidence. They come either from industry publications, which do not disclose the methods used in their compilation and are not subject to verification, or from the Department of Commerce's Census of Manufacturers, whose categories are so broad and vaguely defined that the specific products at issue here could have been reported by manufacturers in any of several different statistical categories. The figures are nevertheless acceptable for present purposes inasmuch as both sides rely on them and the results they show are so decisive that there is no reason to believe that accounting or reporting differences would affect them. These figures show that manufacturers' shipments of beauty products

for retail and professional use in the salon trade totalled approximately $398.9 million in 1976, $434.6 million in 1977, and $483.4 million in 1978. Jhirmack's factory sales are estimated by defendants to be approximately $9.0 million in 1976, $13.9 million in 1977, and $20.1 million in 1978, resulting in a market share of beauty products of 2.3% in 1976, 3.2% in 1977, and 4.2% in 1978. If all manufacturers' shipments of beauty products are included, being potentially competitive in the sale to professional outlets, Jhirmack's share would decline to 0.3%.

C. <u>The Sale of Shampoos and Conditioners Through Professional Outlets Does Not Constitute a Distinct Submarket</u>.

Plaintiffs contend, however, that the relevant market consists of the sale of shampoos and conditioners to consumers for home use, and that Jhirmack's market share must be determined with reference to a distinct submarket limited to retail sales

through salons and other professional outlets. For the reasons explained in the foregoing section of this opinion, the Court has found that the relevant market lies at the wholesale level at which plaintiffs compete, not at the retail level at which their customers compete. However, inasmuch as the parties have devoted substantial resources to litigating this contention, and in the interest of reaching a complete adjudication, the Court will proceed to determine the question whether a submarket as claimed can be found to exist here.

Plaintiffs, to sustain their submarket theory, have to establish that the salon submarket is

> sufficiently distinct in commercial reality to permit a company that dominated [it] to exclude competition and control prices. This depends on whether efforts to exclude competition or control prices in the [submarket] in question would be negated by a shift of buyers to other portions of the market. (citations omitted)

Greyhound Computer v. Intern. Business Machines, 559 F.2d 488, 493 (9th Cir. 1977). In ILC Peripherals v. Intern. Business Machines, 458 F. Supp 423, 428 (N.D. Cal. 1978), the court commented that "[t]his inquiry boils down to whether there are products that restrain a defendant's ability to act without regard for other manufacturers and suppliers." Market definition has also been characterized as "a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other." Smith-Kline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir. 1978). In United States v. Empire Gas Corp., 537 F.2d 296, 303 (8th Cir. 1976), the court stated "[w]hether a particular product's sales constitute a relevant market or submarket

depends on the cross-elasticity of demand for that product; in other words, the readiness and ability of consumers to turn to reasonable alternatives to the product in question."

But plaintiffs' claim that the salon market is distinct from the OTC market and not an interchangeable source of supply for consumers runs head-on into their contention that the alleged restraints by defendants prevented them from diverting their products (directly or indirectly) to OTC outlets and "eliminat[ed] the discounting of defendant's products by . . . discount houses, drug stores and other entities." Moveover, the gravamen of the Booth complaint, and to a lesser extent of the other actions, is that by allowing its products to be sold by Playtex to OTC stores, Jhirmack exposed plaintiffs' customers, the salons, to direct competition in the sale of Jhirmack

products. In short, if two different types of retail stores compete for the patronage of consumers in the sale of identical products (albeit at different prices), it is difficult to sustain a contention that, for antitrust purposes, those stores are in distinct submarkets.

Nevertheless, plaintiffs contend that the salon and professional trade constitutes a distinct submarket, relying on Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962), in which the Court said:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar charac-

> teristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. (footnotes omitted)

There the Supreme Court affirmed the trial court's findings rejecting defendant's claims of relevant submarkets of men's, women's and children's shoes based on differences in price, quality, and customer age and sex. Although Brown Shoe was a merger case under Section 7 of the Clayton Act, the decision provides indicia generally applicable to Section 1 and 2 cases. It must, however, be applied with due regard for the observation of the Ninth Circuit that

> [t]hese indicia were listed with the intention of furnishing practical aids in identifying zones of actual or potential competition rather than with the view that their presence or absence would dispose, in talismanic fashion, of the submarket issue. Whether or not a court is justified in carving out a submarket depends ultimately on whether the factors which distinguish one purported

> submarket from another are "economically significant" in terms of the alleged anticompetitive effect.

International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913, 932 (9th Cir. 1975).

Before examining the evidence in light of the Brown Shoe indicia, it is useful to note what lies at the heart of plaintiff's submarket contention and - for that matter - at the heart of their lawsuits. The essence of the entire controversy is that beauty salons insist on carrying only shampoos, conditioners and other beauty products which are not generally available at OTC outlets. There is abundant evidence that beauty salons have discontinued buying certain brands -- including Jhirmack -- once the brands could be purchased at drug and discount stores and similar outlets. By their course of conduct, therefore, salon operators have generally prevented direct competition with OTC outlets in the sale of particular brands and have

succeeded in maintaining a price range for shampoos and conditioners generally higher than that prevailing at OTC outlets.

A distinct submarket for shampoos and conditioners does not come into existence, however, simply because particular brands may be distributed exclusively through salon outlets. Moreover, it would be offensive to the spirit of the antitrust laws to permit plaintiffs to bottom their antitrust claim on their customers' pursuit of a patently anti-competitive practice.[7/]

Turning to plaintiffs' claim of a relevant submarket limited to sales of shampoo and conditioners through salons and other professional outlets, the indicia set forth in Brown Shoe must be applied to the evidence.

(1) Industry and Public Recognition

There is substantial evidence showing that the salon trade maintains a distinctive identity and seeks to promote a professional image. It has its own associations and

publibcations. Many salons insist on selling only shampoos and conditioners which are not distributed in the OTC trade. Manufacturers cater to salons by producing shampoos and conditioners specifically for them, trying to prevent diversion of those products into OTC outlets, and designing products and packaging that emphasize the importance of professional hair care and the professional prescription of products for home use. Manufacturers like Jhirmack and Redken have developed extensive seminar programs to enable salon personnel to appear more expert and to enhance the prestige of salons and salon products. Some manufacturers produce only for salons. Those that sell the same products in both channels, such as Revlon, use a separate division to sell to salons.

Other evidence shows, however, that OTC shampoos and conditioners compete directly with salon products, and that manufacturers of salon brands consider themselves to be in competition with the entire industry.[8/]

Various of the plaintiffs themselves testified that all manufacturers compete for sales to consumers; that Jhirmack as a salon brand was in competition with "everything that is sold," that "everyone sells shampoos;" and that their hair care products competed with products sold by Safeway. Although salons compete as specialty shops, holding out higher quality at higher prices, they are considered by the industry to be in competition for the same ultimate consumer of shampoo for home use.

(2) Characteristics and Uses

Plaintiffs do not contend that salon shampoos and conditioners have uses or properties not found in OTC products. All shampoos and conditioners perform essentially the same functions; while the many brands available feature a diversity of ingredients, there is no systematic difference between salon products and OTC products. A successful new product is soon imitated by other

brands in both the salon and OTC trades. Plaintiffs contend, however, that consumers perceive shampoos and conditioners sold in salons to be superior to OTC products, and that this perception substantially insulates salons from the competition of the broader market.

The evidence suggests that consumers generally associate salon products with superior quality. However, they do not necessarily associate professional characteristics exclusively with salon products. Although some customers value the endorsement and sale by salons, others are influenced by the promotion of a product as professionally formulated and endorsed regardless of where it is sold.

A number of brands in the salon trade have been successfully marketed in the much larger OTC trade on the strength of their salon origins and the resulting consumer perception that they were of professional quality and professionally endorsed. Salons some-

times serve as springboards enabling salon brands to gain entrance to the larger OTC trade, as in the cases of Clairol, Vidal Sassoon and L'Oreal. Some brands are widely distributed for retail through both salons and OTC outlets on a regular basis. Revlon Flex, for example, is highly successful in both channels of distribution. There is also evidence suggesting that unauthorized diversion to OTC outlets of brands intended for sale exclusively in salons is extensive. In fact, widespread diversion of Jhirmack products was one of the reasons that Jhirmack turned to distribution through OTC channels.

The manner of Playtex's promotion of Jhirmack shampoos shows that Playtex's marketing experts expected that a professional image could be sold outside the salons, and at prices which were relatively high by OTC standards. The salon background, professional quality, and special-

ized formulation of Jhirmack products are the central themes stressed in Playtex's marketing strategy.

(3) Distinct Customers

As has been shown above, OTC outlets offer shampoos and conditioners which are not only interchangeable with those sold in salons in terms of ingredients, but which also feature the professional formulation and endorsement characteristic of salon products. Customers seeking such characteristics can find them among OTC products. However, evidence tending to show that consumers who patronize salons tend to buy these kinds of products only in salons would support finding a submarket within the broader market. For example, in Columbia Broadcasting System, Inc. v. F.T.C., 414 F.2d 974, 979 (7th Cir. 1969), the court noted that members of record clubs had a distinctive "demand function" setting them apart from consumers who pur-

chased the same kinds of records through other channels of distribution. In _United States v. Grinnell Corp._, 384 U.S. 563, 574 (1965), the Supreme Court noted, in finding a market composed of accredited central station alarm services, that "some customers will be unwilling to consider anything but central station protection" in choosing alarm systems. _See_ _Knutson v. Daily Review, Inc._, 548 F.2d 795, 804 (9th Cir. 1976)(submarket analysis should have inquired into whether readers tended to subscribe to both metropolitan and satellite-city newspapers or only one type).

There is testimony tending to support plaintiffs' claim that Jhirmack shampoos and conditioners "appealed to a distinct group of customers, i.e., those persons who frequented salons and were willing to pay a higher price for what they believed to be a superior product because it was endorsed and sold through the salon."

There is also evidence, however, of surveys tending to show that customers who buy shampoo and conditioner at salons also buy them at OTC outlets. Salon customers whose purchases of salon shampoo or conditioner run out between appointments buy more in a "drugstore or supermarket, whichever is convenient."

Other testimony indicates that consumers of hair products, generally, "use many different brands at the same time, varying brands constantly." and that "customers are constantly changing their desires." Shampoo types have short life cycles and in this respect "shampoos have the characteristics of a fashion good." "Brand loyalty is low' interchangeability is high."

Price competition, too, can prompt salon customers to turn to OTC outlets for shampoo and conditioner. The relatively high prices charged by salons caused them to lose sales to OTC outlets. The extensive evidence show-

ing that salons opposed diversion of their brands into OTC outlets and that diversion cut into their sales suggests that many customers switched from buying an exclusive brand in their salons to buying it in OTC outlets instead once it became available there.

Some shampoo and conditioner brands prominent in salons are also regularly sold in OTC channels and the salon prices for these brands are kept low enough to compete with the OTC prices. This reflects an expectation that customers who buy these brands in salons might choose to buy them elsewhere if the price differential between the two channels of distribution were any greater.

While, according to this evidence, there may be customers who generally buy shampoos and conditioners only in salons, there is no substantial evidence establishing the existence or size of such a class.

On the other hand there is considerable evidence indicating that many salon customers, for reasons of price or convenience, are willing to purchase these products at OTC outlets.

(4) Prices and Price Sensitivity

Comparison between the price levels within an alleged submarket and those without offers some evidence of the degree of cost-elasticity of demand between the two channels. If prices in an alleged submarket are significantly higher than those for otherwise reasonably interchangeable products sold elsewhere, an inference of absence of price competition may arise.

Plaintiffs contend that because shampoos and conditioners are sold at retail in the salon trade at substantially higher prices, and with higher mark-ups, than in OTC outlets, the two channels of trade are not competitive. Defendants argue that the existence of a substantial price overlap

for all shampoos and conditioners, regardless of outlet, refutes that contention.

Relative Price levels

That the prices of shampoos and conditioners sold in salons are higher as a group than the prices of shampoos and conditioners sold in OTC outlets, as a group, is undisputed. Many salon brands, because of prestige and limited availability, command premium prices.

Plaintiffs showed, moreover, that Jhirmack's sales of shampoo and conditioner increased substantially in the several years preceding its move into the OTC trade at the same time that its products were sold at retail prices much higher than the OTC prices of comparable products or the prices of Jhirmack products diverted to OTC outlets. In Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 713 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), Fotomat's ability to charge distinctive prices while increasing

its sales was an important factor supporting the district court's finding of a separate submarket consisting of drive-through photo processing. In appraising the validity of the claim of a submarket consisting generally of shampoos and conditioners which are sold in salons, however, the court needs to look beyond the experience of one firm to that of the trade. The evidence suggests that the salon trade as a whole enjoyed a substantial increase in retail shampoo sales, at least between 1976 and 1980, but does not indicate whether that increase was shared by premium-priced brands or occurred largely among brands sold at lower prices. Thus there is no evidence that the salon trade in general was able to maintain higher retail prices without competitive disadvantage.

A number of the best selling brands in the salon trade are also distributed to OTC outlets on a regular basis. No evi-

dence was presented showing the salon prices of these dually distributed brands. There is no reason to assume that the salon prices for these brands are substantially higher than the OTC prices, and certain evidence suggests that in fact they are not. The testimony establishes that salons could not maintain their price levels for products like Jhirmack if the same product were widely available to the consumer through OTC outlets, and that the salons' ability to charge a premium price for a certain brand depends on limited availability of that brand. Thus one would expect that the wider availability of the dually distributed brands would act as a check on salon prices of those brands. That many salons stopped carrying Jhirmack when it became known that it would be distributed by Playtex in the OTC trade indicates that they expected the competitive price to be substantially lower. A similar drop in the number of salons car-

rying Vidal Sassoon occurred when its manufacturers pursued distribution in the OTC trade.

Plaintiffs have shown that the salon retail prices of brands manufactured exclusively for salons were substantially higher than prices of the same products sold in OTC outlets through diversion. It appears that when diversion of an exclusive brand like Jhirmack is slight, the limited availability of the product in OTC outlets at substantially lower prices does not impinge on salons' ability to maintain the regular premium price. When diversion of an exclusive brand becomes extensive enough to cut into a salon's sales of that brand, salons tend to discontinue that brand and find another. Thus widespread diversion of an exclusive salon brand provides a competitive check on the salon's ability to sell that brand at a premium price.

<u>Price range overlap</u>

A study of price distribution for shampoos at six major types of retail outlets showed that the price ranges at some salons and at some drug, food, and mass merchandise outlets overlap by about half a dollar, approximately a quarter of the OTC price range and a fifth of the salon's price range. Conditioner prices at salons overlap by about six dollars with the price ranges at drug, food and mass merchandise outlets, approximately three quarters of the OTC price range and half of the salon price range.

Defendants cite cases rejecting submarkets which rely on evidence of an overlap of prices between products in an alleged submarket and those in the broader market. In <u>Brown Shoe</u>, 370 U.S. at 326, the Supreme Court affirmed the district court's finding that "medium-priced" shoes competed with "low-priced" shoes, and re-

jected as "unrealistic" defendant's "contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above $9.00" In <u>United States v. Jos. Schlitz Brewing Co.</u>, 253 F.Supp. 129 (N.D. Cal.), <u>aff'd</u> <u>per</u> <u>curiam</u>, 385 U.S. 37 (1966), defendant contended that premium and non-premium beer constituted separate lines of commerce. The district court, observing that beer prices ranged over a wide spectrum, declared that there was "no rational way of chosing a point along this price spectrum and saying that all beer which sells above that point constitutes a line of commerce, or even a sub-market, apart from all beer which sells below that point. This is precisely what the Supreme Court refused to do in <u>Brown Shoe</u> . . . ." <u>Id</u>. at 145. Nevertheless, even though the price ranges of two sets of products overlap, they may be sufficiently distinct to indicate a lack of significant price competition

between the products. <u>See</u> P. Areeda and D. Turner, 2 <u>Antitrust Law</u> 420 (1978). The existence of a price overlap, therefore, although relevant, is not determinative of the issue of price competition.

Viewing the evidence as a whole, it establishes neither an absence of price competition between salons and OTC outlets nor a lack of sensitivity of salon prices to OTC pricing levels. Although salons are able to charge premium prices for certain brands under conditions of exclusivity and scarcity, their price range overlaps significantly with OTC prices and their competitive behavior is sensitive to that of OTC outlets.

(5) <u>Specialized Vendors</u>

Plaintiffs contend that salons constitude a distinct channel of distribution substantially insulated from the competition of other vendors of shampoo and conditioners because of the salon's ability to provide

specialized services to customers and to offer exclusive brands.

Plaintiffs argue that customers are willing to pay premium prices to get a specialized service consisting of personalized advice on what products to buy and how to use them. Hairdressers customarily recommend to their patrons the purchase of certain hair products sold by the salon for home use. These products are often formulated for specific hair types and hair problems. The hairdressers learn how to prescribe the right product in a convincing manner at educational programs conducted by manufacturers of salon products as a major part of their sales effort. In this fashion, manufacturers use the hairdressers as a "sales force."

Some consumers do value a hairdresser's advise regarding selection of hair products for home use and are willing to pay for it. But the evidence is not convincing that they

need such advice. Interested consumers are normally able to tell from the advertising and packaging which products to purchase for their own kind of hair or hair problem. Some brands sold in OTC outlets have precisely the same ingredients and uses as those sold in salons, and consumers are capable of making the right selection unaided from among these products.

As heretofore noted, some manufacturers of shampoo and conditioners produce for distribution exclusively within the salon trade. They cater to a stong demand among salons for brands which are distributed exclusively to salons and project an elite professional image. Many salons decline to sell products available in OTC outlets, primarily in order to avoid price competition. Salons are generally unable to maintain premium prices for products widely available at lower prices in OTC outlets.

The exclusive sale of certain brands in

a separate channel of distribution may be evidence supporting a finding of a submarket, Cornwell Quality Tools Co. v. C.T.S. Company, 446 F.2d 825, 830 (9th Cir. 1971), but, as heretofore discussed, the anticompetitive overtones of the salons' conduct rob this evidence of persuasiveness here. Moreover, a considerable portion of the salon trade sells brands of shampoo and conditioner which are distributed to both salons and OTC outlets on a regular basis, including Helene Curtis, LaMaur, Clairol, Wella, and Revlon. Some of these brands are sold by their manufacturers through separate divisions, servicing the salon and the OTC trades respectively. But there is no evidence to indicate that the products differ. It thus appears that, although salons attempt to maintain an aura of distinctiveness, it is more apparent than real.

Analysis of the evidence in the light of Brown Shoe indicia, therefore, leads to the conclusion that plaintiffs have failed to prove by a preponderance of the evidence that the salon trade constitutes a distinct submarket for the sale of shampoos and conditioners. See United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Neugebauer v. A.S. Abell Co., 474 F.Supp 1053 (D. Md. 1979). Plaintiffs' case finds no support in the decision in Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), on which they rely. There the court upheld the trial court's finding that "drive-thru retail photo processing" constituted a submarket distinct from "photo processing services offered in drug stores, supermarkets, etc." Id. at 712. The evidence showed, among other things, that Fotomat's business grew while its prices were 20 to 50 percent higher than drugstore and discount store prices; that the industry

regarded drive-thru retail photographic processing as a separate method of doing business; that consumers were willing to pay a premium for the convenience of drive-thru service, and that the Fotomat personnel, unlike drugstore or discount store personnel, were specialists. In affirming the district court, the court of appeals noted that "in defining the relevant submarket the legal 'guidelines offer no precise formula for judgment and [that] they necessitate, rather than avoid, careful consideration based on the entire record' . . ." Id. at 714.

In the instant case, although there are some differences between the products, prices and services offered at salons and OTC outlets, the extent of competition bewteen these classes of outlets turns primarily on the degree of success experienced by salons in maintaining the exclusive distribution of brands of shampoo

and conditioners. The "separateness" of the salon trade, when and where it is found, is largely the result of the salons' efforts to insulate themselves from competition with retail stores by insisting on exclusive distribution of particular brands. That kind of contrived fencing-in of a segment of the market by anti-competitive practices, even it if did not preclude finding a submarket upon proper and sufficient proof, is not acceptable evidence to support such a finding.

The Court therefore finds that if the relevant market were to be found at the retail sales level, it would consist of the sale of shampoos and conditioners for home use by both salons and other professional outlets and OTC outlets. As noted above, the available market data permit one to make only the roughest of estimates. The evidence indicates that in that market Jhirmack's share of shampoo sales is less

than one percent and its share of conditioner sales approximately two percent.

IV. THE TYING ARRANGEMENT

Plaintiffs' tying claims attack Jhirmack's new product purchase quota. Jhirmack required each distributor to order a specified quantity of a new product in his next regular order following its introduction. The requirement was limited to a single order. Continued failure to order the specified quantity would result in Jhirmack's refusal to fill further orders of that distributor, and ultimately in cancellation of the distributorship. The JBL plaintiffs contend that this policy constituted an unlawful tying arrangement; the Booth plaintiffs limit their claim to the tying of one product, Irene Cologne, to the purchase of Jhirmack's "other beauty care products."

A. Section 1 - Per Se Violation

Tying arrangements are presumptively

illegal if they meet three conditions:

> (1) That the tying arrangement covers two distinct products;
>
> (2) That the defendant has sufficient economic power in the tying market to impose significant restrictions in the tied product market; and
>
> (3) That the amount of commerce in the tied product is not insubstantial.[9/]

Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1212 (9th Cir. 1977).

1. Distinct Products

Plaintiffs contend that the purchase of new products was tied to the purchase of the so-called Basic Six, a collection of shampoos and conditioners constituting the heart of Jhirmack's product line. Thus distinct products were the subject of the tying arrangement. That the nature of the tied product changed from time to time as new products were

introduced is immaterial. United States v. Loew's Inc., 371 U.S. 38 (1962)(defendants' block booking of motion pictures for television, including a mix of desirable and undesirable pictures in single packages which changed from time to time, held to constitute illegal tying arrangement).

In view of the foregoing conclusion, it is not necessary to decide whether the use of the Jhirmack trademark also constitutes a distinct product, supporting the tying claim. It should be noted, however, that Siegel v. Chicken Delight, Inc., 448 F.2d 43, 49 (9th Cir. 1971), on which plaintiffs rely, does not support their argument. The court there explained the tying arrangement found in that case as follows:

> . . . [I]t is apparent that the goodwill of the Chicken Delight trademark does not attach to the multitude of separate articles used in the operation of the licensed system or in the production of its end product.

> It is not what is used, but how it is used and what results that have given the system and its end product their entitlement to trademark protection. It is to the system and the end product that the public looks with the confidence that established goodwill has created.

In the instant case, by way of contrast, the Jhirmack trademark was not separately licensed or franchised but was attached to each of the products sold, serving as an emblem of their origin. See Siegel, 448 F.2d at 48. When so used, a trademark cannot be considered a distinct tying product. Refrigeration Engineering Corp. v. Frick Co., 370 F. Supp. 702, 711 (W.D. Tex. 1974); Mid-America ICEE, Inc. v. John E. Mitchell Co., [1973-2] Trade Cas. ¶ 74,681 at 94,986-87 (D. Or. 1973).

2. Economic Power

The Court has heretofore found and concluded that Jhirmack's share of the relevant market did not exceed 5%. On the basis of

that finding, it must conclude here that Jhirmack lacked the economic power in the tying market to impose significant restrictions in the tied product market, under U.S. Steel Corp. v. Fortner Enterprises, 429 U.S. 610 (1977) (Fortner II).

Plaintiffs contend, however, that Jhirmack's products are sufficiently unique to give it "some advantage not shared by its competitors in the market for the tying product." Id. at 620. "Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves." Id at 621. In Fortner the tying product was the "unusual credit bargain" offered by a subsidiary of U.S. Steel to customers of U.S. Steel's prefabricated housing division. There was no evidence that the division, although it was owned by the nation's largest manufacturing company, had any cost advantage over com-

peting finance companies or that it could offer financing significantly different from what other lenders could offer if they so elected. The Court held that "[t]he unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." Id at 622. Without evidence of some advantage over competitors, the unique character of a product or service does not support a conclusion that the requisite economic power exists.

Plaintiffs contend that the Jhirmack trademark makes the products sufficiently unique to create economic power. They rely on Chicken Delight, in which the court held that the "unique registered trademark, in combination with its demonstrated power to impose a tie-in" established market power. 448 F.2d at 49.[10/] Even if the Chicken Delight trademark -- licensed, unlike Jhirmack's, independently of the

product -- could have afforded such an advantage,[11] the Jhirmack label attached to a product clearly does not. To infer economic power from the mere existence of a trademark which identifies the origin of the product would render the requirement that the seller have economic power in the relevant market vitually meaningless. The great majority of consumer products are sold under trademarks. The mere use of a trademark does not give a manufacturer an advantage not shared by his competitors whose products are also sold under trademarks, and does not give the economic power in the tying market necessary to have an impact on competition. See Forther II, 429 U.S. at 620.

Plaintiffs have failed to establish that the Jhirmack trademark afforded its users some advantage not shared by competitors or that it was otherwise so preeminent that a presumption of economic power

is warranted. The alleged power of the Jhirmack trademark is said to derive from its association with Jheri Redding, the founder of Jhirmack, who enjoys "industry-wide recognition and respect." (Plaintiffs' Trial Brief at 36-37). But whatever "uniqueness" derived from Mr. Redding's name has been greatly diluted, if not lost, by the association of his name with the products of at least three other competing manufacturers. Before his association with Jhirmack, Mr. Redding founded and subsequently sold first Jheri Redding Products, Inc., which continues to market products under the name, and then Redken. After he left Jhirmack, Redding's name became and is now associated with the products of his newest company, Nexxus. If plaintiffs' premise were accepted, the Jheri Redding name should now have drawn customers from Jhirmack to Nexxus, greatly diminishing the strength of the Jhirmack trademark.

The market for shampoos and conditioners is volatile and highly competitive. There are numerous manufacturers in the market selling a multitude of brands and employing a variety of distribution and marketing techniques. Jhirmack dealt at most with eighty distributors out of hundreds if not thousands throughout the country. Even if a distributorship itself could be considered a tying product, plaintiffs presented no evidence to show that the opportunity to market Jhirmack products was sufficiently unique and desirable to support a presumption that Jhirmack thereby possessed appreciable economic power in the relevant market.

The foregoing analysis demonstrates why plaintiffs' per se claim must fail. It is not inappropriate, moreover, to view this dispute from a broader perspective. The reasons for the per se illegality rule applied to tying arrangements are summarized in Moore -- the rule is intended to protect

suppliers of competing products, buyers who must forego a choice of products, and the public which is harmed by the adverse effect on the market. A requirement that every distributor submit a one time order for a new product to round out its inventory hardly affects these interests. And certainly the instant arrangement does not create a risk of price discrimination, the principal target of the _per se_ rule. _Moore_, 550 U.S. at 1212-13.

B. _Section 1 - Rule of Reason_

Even if some or all of the elements of a _per se_ violation are absent, a tying arrangement may be found to violate section 1 under the standard of the rule of reason. _Fortner I_, 394 U.S. 495, 500 (1969); _In re Data General Corp. Antitrust Litigation_, [1980-1] Trade Cas. ¶ 63,219 at 78,051 (N.D. Cal. 1980). This requires determination of the relevant market and of the seller's share of that market in accordance with the principles which apply to the

alleged customer and territorial restraints. Gough, 585 F. 2d at 389. The analysis in parts III. B. and C. of this opinion, and the disposition of the customer and territorial restraints claim will apply equally to this claim.

C. Section 3

Section 3 of the Clayton Act provides that it shall be unlawful for any person engaged in commerce to make a sale of goods on the condition that the purchaser shall not use or deal in the goods of a competitor, where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Plaintiffs' Section 3 claim must be rejected.

First, it does not appear that the distributorship agreement or Jhirmack's policy towards its distributors restricted their dealings with other suppliers. Thus an essential element of a Section 3 viola-

tion is lacking. _See_ _David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc._, 504 F.2d 52, 57 (4th Cir. 1974), _cert_. _denied_, 420 U.S. 992 (1975); _McElhenney Co. v. Western Auto Supply Co._, 269 F.2d 332, 338 (4th Cir. 1959).

Second, plaintiffs have failed to show that Jhirmack possessed sufficient economic power to threaten the prohibited effect.

Before the decision in _Fortner II_, the mere existence of a tying arrangement coupled with the presence of a not insubstantial amount of commerce was sufficient to create a presumption of the requisite economic power for a violation of Section 3. _Advance Business Systems & Supply Co. v. SCM Corp._, 415 F.2d 55 (4th Cr. 1969), _cert_. _denied_, 397 U.S. 920 (1970). The Ninth Circuit has interpreted _Fortner II_, however, as providing "virtually identical" standards for determining whether tying arrangements violate Section 3 and the _per_ _se_ prohibition

of Section 1 of the Sherman Act. Moore, 550 F.2d at 1214. See Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir. 1978); In re Data General, [1980-1] Trade Cas. at 78,050.

As heretofore discussed, the finding that Jhirmack's market share did not exceed 5% precludes an inference of sufficient economic power. See Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-29 (1961). Nor have plaintiffs shown Jhirmack's products or its trademark to be sufficiently unique to warrant a finding of economic power. See Fortner II, 429 U.S. at 619-22. Furthermore, Jhirmack distributors are required to place only a single order for each new product under the quota program; this does not indicate the existence of the kind of leverage at which the tying prohibition is aimed. Id. at 617-18. Thus Jhirmack's new product purchase quota

could not be found to be a violation of Section 3 of the Clayton Act.

Disposition

Based on the foregoing discussion, findings of fact and conclusions of law, the Court

A. dismisses plaintiffs' tying claims insofar as they assert a violation of Section 3 or a per se violation of Section 1;

B. directs defendants to file motions for summary judgment in all cases directed at the following issues, and such other issues as they may wish to raise:

(1) Whether the Booth plaintiffs present a triable issue as to whether they suffered injury cognizable under Section 4 of the Clayton Act;

(2) Whether any plaintiffs present a triable issue as to whether the alleged customer and territorial restraints and the

alleged tying arrangements had the requisite impact on competition in the relevant market to violate the rule of reason;

(3) Whether Jhirmack's agreement with Playtex could be found to be a breach of section 1 of the Jhirmack distributors' agreement which grants distributors "an exclusive license . . . within the territory," when that agreement defines "territory" so as to exclude the over-the-counter outlets subject to the Playtex agreement;

(4) Whether, even if the Jhirmack-Playtex agreement were found to be a breach of the distributors' agreement, enforcement of the latter agreement so as

> to preclude Jhirmack from entering into competing distribution arrangement [sic] would be contrary to law and public policy.

Defendants are directed to file their motions and supporting papers by March 20, 1981. Plaintiffs shall respond by April 10, 1981. Reply memoranda may be filed by April 17, 1981. Argument will be heard Friday, April 24, 1981, at 11 a.m.

IT IS SO ORDERED.

DATED: February 25, 1981.

/s/ William S. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

FOOTNOTES

1/ Since that time, an additional action asserting claims arising out of the same circumstances as the JBL and Booth complaints was transferred to this district, and consolidated with these actions on October 28, 1980. Jhirmack of Cincinnati v. Jhirmack Enterprises, C-80-3699.

2/ No claim is made that these restrictions amount to per se violations. See Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977); Gough v. Rossmoor Corp., 585 F.2d 381, 388 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979).

3/ The following colloquy during closing arguments sheds further light on the nature of the Booth claim:

> THE COURT: What happened? What did Jhirmack do that's a violation of the antitrust laws?
>
> MR. CARTWRIGHT: By giving the business, taking the business away, the professional product from the professional market, and putting it over the

counter through Playtex, they have, in effect, destroyed Jhirmack's and my client's market in the professional market. They have destroyed that market; and it's tended towards the creation of a monopoly on the part of Redken and the others that service that market and so they have decreased the amount of competition dramatically in the professional market, whereas, according to some of the testimony that we have in the record, Jhirmack was number one in that market. Now, it's zilch.

THE COURT: So what you're saying is that the violation of the antitrust laws consisted of the agreement between Jhirmack and Playtex by which . . . the ability of the distributors to sell Jhirmack products exclusively was taken away and destroyed and they faced the competition of OTC outlets?

MR. CARTWRIGHT: They put them cut of business is what happened.

* * *

THE COURT: Now let me ask you a question. I understand the injury to your people. What is the injury to competition?

MR. CARTWRIGHT: They dramatically reduced the competition in the market that we're talking about. Jhirmack no longer is an effective competitor in that market and at the time this happened was either number one or

number two in the professional market; so they have destroyed competition in substantial part in the professional market dramatically, dramatically reduced it.

THE COURT: So what you're saying is that they have reduced competition by making it unattractive to salons to continue to carry Jhirmack because it's been sold OTC; is that right?

MR. CARTWRIGHT: As a practical matter they can't do it.

4/ The parties agree that the relevant geographic market consists of the entire United States.

5/ Plaintiffs also argue that shampoo and conditioners must be treated as a separate line for two additional reasons. They say that the demand for sales outside of assigned territories was mainly for shampoos and conditioners and that those products must therefore be treated as a separate line. The evidence shows, however, that the amount of diversion represented by shampoos and conditioners was roughly in proportion to their share in total sales of Jhirmack products.

Second, they contend that some Jhirmack distributors had trouble selling cosmetics. But the evidence indicates that the difficulties arose from competitive conditions: price, lack of uniqueness and the time and manner of introduction.

6/ Salons buy products for two purposes, professional use and retail sale. The difference lies in the packaging; supplies for professional use come in large packages, sometimes fitted with special attachments for dispensing. While products packaged for professional use serve a different purpose for the salon from retail packages, that difference is irrelevant to the distributor selling to the salon. Furthermore distributors' sales of professional use products are related to sales of retail products in that salons will buy a brand for use in the salon in order to promote the retail sale of that brand to their clients. Both professional use and retail beauty

products are therefore a part of a single relevant market at the distributor level.

7/ Plaintiffs' reliance on United States v. CBS, Inc., 459 F. Supp. 832 (C.D. Cal. 1978), is misplaced. In that case the court held that a relevant submarket might be found to exist even if it was the product of anticompetitive practices. But it did so at the instance of plaintiff and for the purpose of imposing liability on defendant for the very practices which caused the submarket to exist. See discussion of a similar point in Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377 (1927):

> The jury was instructed, in substance, that if, during the preceding period in which the plaintiff had been a customer of the defendant, it had not merely bought goods from the defendant because of a business necessity, but, with a knowlege of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was in pari delicto, and hence could not recover any damages whatever on account of the defendant's refusal to continue

> to sell it goods; and further, that even if the plaintiff had not been a party to the monopoly, it could not recover damages on the basis of the profits which it had earned while a customer of the defendant to the extent that they had been increased by the monopoly and exceeded those in a normal business, but that they must be reduced to the basis of normal profits.
>
> We find, under the circumstances of this case, nothing in these instructions of which the defendant may justly complain.

8/ Jhirmack's 10-K report to the Securities Exchange Commission for the fiscal year ending April 30, 1978, states

> The Company encounters competition in the sale of all its products from a large number of companies, most of which have larger facilities and significantly greater financial resources than the Company. Many of the Company's larger competitors market their products through conventional retail outlets, including drug and department stores, while others market their products through both professional beauty and barber salons and commercial outlets.

9/ Inasmuch as Jhirmack distributors purchased over $900,000 of products under the new product requirement, the Court finds

the amount of commerce to be not insubstantial.

10/ It should be noted that the Ninth Circuit in Moore, commenting that "the desirability which results from patent or copyright protection constitutes sufficient power for purposes of § 1", neither mentions trademarks nor cites Chicken Delight. 550 F.2d at 1215-16.

11/ The Chicken Delight trademark had been shown to enjoy a unique nationwide preeminence. See Cash v. Arctic Circle, Inc., 85 F.R.D. 618, 621 (C.D. Wash. 1977); Esposito v. Mister Softee, Inc., [1976-2] Trade Cas. ¶ 61,202 at 70,478-479 (E.D. N.Y. 1976). See also Krehl v. Baskin Robbins Ice Cream Co., 78 F.R.D. 108, 120 (C.D. Cal. 1978); Data General, supra, [1980-1] Trade Cas. ¶ 63,219 at 78,062.

EXHIBIT A. TO APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-78-1227 WWS

JBL ENTERPRISES, INC., et al.

Plaintiffs,

vs.

JHIRMACK ENTERPRISES, INC.,

Defendant.

Case No. C-80-0249 WWS

AL BOOTH, et al.,

Plaintiffs,

vs.

JHIRMACK ENTERPRISES, Inc. et al.,

Defendants.

PRETRIAL ORDER NO. 1.

William W. Schwarzer,
District Judge, Presiding

Filed June 12, 1980

PRETRIAL ORDER NO. 1

GOOD CAUSE APPEARING, It is hereby stipulated by the parties and ordered by the Court as follows:

1. Separate Trial. Pursuant to Rule 42 of the Federal Rules of Civil Procedure, these actions are hereby consolidated for a separate trial of all issues with respect to (a) The relevant market, (b) Jhirmack Enterprises, Inc.'s share of the relevant market and (c) whether Jhirmack's initial purchase policy constituted a tying arrangement as to any of its products; provided, however, that any issues regarding justification, causation and damages for any alleged tying arrangement shall be reserved for later trial.

2. Trial by Court. The issues specified above shall be tried by the Court sitting without a jury. The parties' stipulation to trial of these issues by the Court does not constitute a waiver of their right to a jury

trial with respect to other issues.

3. <u>Discovery Schedule</u>. All discovery on the issues specified above shall be completed and all responses to interrogatories and other requests regarding the issues specified above shall be served and filed by August 15, 1980.

4. <u>First Pretrial Conference</u>. The first pretrial conference shall be held on August 15, 1980, at 3:00 p.m.

5. <u>Exchange of Exhibits and Pretrial Statements</u>. By September 5, 1980, counsel shall designate excerpts of depositions and exchange copies of all proposed statements of each party's witnesses, exhibits to be offered and all schedules, summaries, diagrams and charts to be used at trial other than for impeachment or rebuttal. By September 5, 1980, counsel shall also exchange and file pretrial statements and trial briefs. The provisions of Local Rules 235-6 and 235-7 shall apply as appropriate.

6. Final Pretrial Conference. The final pretrial conference shall be held on September 12, 1980, at 3:00 p.m.

7. Trial Date. Trial of the issues specified above shall commence on September 22, 1980, at 9:30 a.m.

KITHAS & LAMONT

By /s/ Charles Lamont
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LUKENS and ST. PETER
ADELMAN & SCHWARTZ

By /s/ William M. Lukens
Attorneys for defendant Jhirmack Enterprises, Inc. and Irene Redding and Albert J. Schwartz in JBL and Booth action (C-78-1227-WWS and C-80-0249 WWS)

CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER, INC.

By /s/ Derry Ellen Rivendale
Attorneys for plaintiffs in Booth action (C-80-0249-WWS)

BROAD, KHOURIE & SCHULZ

By /s/ Mark J. Le Hocky
Attorneys for defendant International Playtex, Inc., Esmark, Inc. and Joel E. Smilow in Booth action (C-80-0249-WWS)

DATED: 6/11/80

/s/ William W. Schwarzer
William W. Schwarzer
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-78-1227 CBR

JBL ENTERPRISES, Inc., et al.,

Plaintiffs,

v.

JHIRMACK ENTERPRISES, Inc.,

Defendant.

ORDER RE DEFENDANT
JHIRMACK ENTERPRISES'
MOTION FOR SUMMARY
JUDGMENT

Charles B. Renfrew,
District Judge,

Presiding.

Filed September 19, 1979

ORDER RE DEFENDANT
JHIRMACK ENTERPRISES'
MOTION FOR SUMMARY
JUDGMENT

This matter having come on for hearing before the Honorable Charles B. Renfrew, United States District Judge, upon defendant Jhirmack Enterprises' motion for summary judgment on the claims of resale price maintenance and monopolization, the Court having reviewed the memoranda, declarations, pleadings and records filed to date, and having considered the arguments of counsel,

IT IS HEREBY ORDERED that defendants' motion for summary judgment on the claim of resale price maintenance as alleged at paragraph 12(b) of the First Amended Complaint is hereby granted;

IT IS HEREBY FURTHER ORDERED that plaintiffs shall have ten (10) days to amend their complaint to state a cause

of action of a combination and conspiracy on the issue of resale price maintenance.

DATED September 19, 1979

/s/ Charles B. Renfrew
United States District Judge

APPROVED AS TO FORM :

KITHAS & LAMONT

/s/ Charles Lamont
Charles Lamont
Attorneys for Plaintiffs

September 13, 1979

LUKENS AND ST. PETER
ADELMAN AND SCHWARTZ

/s/ Michael St. Peter
Michael St. Peter
Attorneys for Defendant

September 12, 1979